Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-633

AAACON AUTO TRANSPORT, INC.,

Petitioner,

-against-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as subrogee of JOSEPH ROMAGNOLI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RALPH J. ZOLA
Attorney for Petitioner
228 West 41st Street
New York, N.Y. 10036
(212) 354-1444

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as subrogee of JOSEPH ROMAGNOLI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Aaacon Auto Transport, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated June 9, 1976, reversing an order of the United States District Court for the Eastern District of New York, dated September 16, 1975. A petition for rehearing, timely filed with the Second Circuit, was denied by order dated August 6, 1976.

OPINIONS BELOW

In the case below, petitioner petitioned the United States District Court for the Eastern District of New York for an order directing arbitration pursuant to 9 U.S.C. Section 4 and to stay state court litigation pursuant to 28 U.S.C.

2283. The order and decision of the District Court, per Costantino, J., not reported, granting petitioner's petition, is set forth in Appendix No. 1. The opinion of the Second Circuit reported at 537 F.2d 648 (2d Cir. 1976) is set forth in Appendix No. 2. The order of the Second Circuit denying rehearing is set forth in Appendix No. 3.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the District Court was invoked under 49 U.S.C. Section 20(11) and 9 U.S.C. Sec. 4.

QUESTIONS PRESENTED

1. Whether Section 20(11) of the Interstate Commerce Act, 49 U.S.C. Section 20(11), creates a "venue liability" which would conflict with an agreement between a carrier and a shipper to arbitrate claims disputes at a given location.

2. Whether a letter from an employee of the Interstate Commerce Commission constituted a final order of the Commission thereby estopping Aacon and its customers from agreeing to arbitrate claims at a given location.

STATUTES INVOLVED

The pertinent statutory provisions are as follows:

1. Sections 2 and 4 of the Federal Arbitration Act, 9 U.S.C. Sections 2 and 4; and

2. Sections 20(11), 316(e) and 317(a) of the Interstate Commerce Act, 49 U.S.C. Sections 20(11), 316(e) and 317(a); and

3. Title 28 U.S.C. Section 2283.

STATEMENT OF THE CASE

The facts of the case are essentially as follows:

Petitioner Aacon Auto Transport, Inc. ("Aacon") is an interstate carrier transporting motor vehicles between various points in the United States, pursuant to certification by the Interstate Commerce Commission. On or about June 21, 1972, petitioner and one Joseph Romagnoli ("Romagnoli") entered into a bill of lading agreement which provided that petitioner would transport Romagnoli's vehicle from South Carolina to California. The arrangements were made with Aacon's Atlanta, Georgia office.

The bill of lading agreement contained the following provision, *inter alia*:

> "Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or the performance or breach thereof shall be settled by arbitration in New York City."

Romagnoli's insurer-subrogee, respondent State Farm Mutual Automobile Insurance Co. ("State Farm") alleges that the truck was damaged in transport in the State of Washington while in the possession of Aacon's driver, a Wyoming resident. In or about February, 1974, State Farm commenced an action against Aacon in Municipal Court, County of Orange, California, to recover damages of $1,527.27 based on a Washington State appraiser's report, including both its payment to its insured and its insured's deductible portion under a policy of insurance. Thereafter, Aacon filed a petition to compel arbitration pursuant to 9 U.S.C. Sec. 4, in the Eastern District of New York and to stay the California action at law pursuant to 28 U.S.C. 2283.

The District Court, in granting Aacon's petition to compel arbitration and for a stay, noted the variety of

locations of necessary witnesses connected with the interstate transaction in question:*

> "It should also be observed that the contract was arranged in Georgia, the car was tendered to Aaacon in South Carolina, the alleged incident took place in the State of Washington, the driver resides in Wyoming, Aaacon's records and documents concerning this transportation as well as its claims personnel are in New York and the owner of the vehicle resides in California. The foregoing indicates that no one state is an obviously better place to hold a hearing than any other from the standpoint of the convenience and expense of obtaining witnesses."
>
> * * *
>
> "Weighing the various factors, it is concluded that enforcement of the arbitration clause is not unconscionable in the factual context of this case." (6 and 7)

The Second Circuit Court of Appeals reversed.

REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit is of significance for several reasons.

1. The premise of the Second Circuit's decision is that 49 U.S.C. Sec. 20(11) creates an "all-inclusive" prohibition

*Petitioner had argued to the District Court that the ease of arbitration would provide a speedy determination to petitioner's right to the benefit of Romagnoli's insurance coverage as a driveaway carrier. *Great Lakes Transit Corp. v. Interstate S.S. Co.*, 301 U.S. 646 (1931); *U.S. v. Auto Driveaway*, 464 F.2d 1380 (7th Cir. 1972). That issue is tangential to the instant petition for certiorari as is the issue of Romagnoli's knowledge of the terms of the bill of lading agreement in light of the undenied fact that he had transported vehicles with Aaacon on other occasions and executed a similar contract.

against interstate carriers limiting their liability to shippers. For the first time, a federal Appellate Court, in interpreting the interstate Commerce Act, has prohibited interstate carriers from limiting their liability to shippers in any respect — including the venue of claims litigation. This judicial extension of the rights and liability of carriers, which, as is show below, was carefully balanced by Congress in the Interstate Commerce Act, has far-reaching implications, and the decision below has received wide reportage in commercial and legal publications. If 49 U.S.C. Section 20(11) is deemed to create all-inclusive liability for interstate carriers, carrier defenses which were heretofore available, such as conditions precedent to payment of shipper claims, which Congress has heretofore recognized and regulated, will be nullified and the relationship between carriers and shippers under federal statutes will be radically altered.

2. The decision of the Second Circuit represents a conflict with the Third Circuit which has upheld the validity of the arbitration provision herein against the attack, *inter alia*, that it conflicted with 49 U.S.C. Sec. 20(11), the same argument presented to the Second Circuit below.*

3. The Second Circuit in its 25-page opinion has characterized this as a case of first impression in the Second Circuit.

4. Congress has declared its clear policy to protect arbitration agreements from judicial erosion and has

*While in the opinion at page 4118, the Second Circuit erroneously referred to the Third Circuit's decision as being one "from the bench", the Second Circuit subsequently issued a correction of its opinion and indicated that the Third Circuit had affirmed "by order" a district court case granting Aaacon's motion to compel arbitration in similar circumstances. The correction is reproduced herein as Appendix 4. The Third Circuit's opinion in *Aaacon Auto Transport Inc. v. Jacobson* is reproduced herein as Appendix 5.

legislated the venue thereof, 9 U.S.C. Secs. 2 and 4. In this case, the Second Circuit ruled that a conflict exists between the Federal Arbitration Act and the Interstate Commerce Act, and upheld the Interstate Commerce Act over the Federal Arbitration Act, despite the later reenactment of the Federal Arbitration Act in 1947.

5. The Supreme Court has heretofore considered as significant, attacks on the validity of arbitration provisions in carriers' bill of lading. *Marine Transit v. Dreyfus*, 284 U.S. 263 (1932). See also: *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967).

The following is a summary of the errors of the Second Circuit urged by petitioner:

1. The Second Circuit Court of Appeals erred in holding that 49 U.S.C. Section 20(11) creates "venue liability" upon carriers, thereby prohibiting agreements to arbitrate at a given location. There is no language in 49 U.S.Sec. 20(11) so stating, and there are clear statements to the contrary in the Congressional debates leading to its enactment.

2. The Second Circuit erred in failing to consider that 49 U.S.C. Section 20(11) only prohibited limitations on "damage liability". Prohibitions on damage liability have been held not to create venue liability.

3. The Second Circuit failed to recognize that Congress limited and did not expand the venue in which carriers could be sued in 49 U.S.C. Section 20(11). The Interstate Commerce Act is not venue expansive unlike the provisions of other statutes to which the Second Circuit sought to draw analogies. Further, Congress preempted the issue of the venue of arbitration by mandating, in 9 U.S.C. Section 4, that the place of arbitration is governed by the district in which a petition therefor is filed, regardless of the place of arbitration set forth in the agreement.

4. The Second Circuit failed to consider that other

regulatory acts in which Congress prohibited limitations on damage liability, similar to the Interstate Commerce Act, have been held to be consistent with arbitration at given locations.

5. The Second Circuit erred in holding that the issuance of a letter by an employee of the Interstate Commerce Commission rejecting a tariff provision for arbitration was a final order of the Commission, was appealable and, therefore, estopped Aaacon from agreeing to arbitrate at New York City.

6. The Second Circuit failed to consider as binding the acts of the Commission in both approving arbitration in a plenary hearing, *Ex Parte 263*, 340 ICC 515 (1972), and approving a tariff provision filed by Aaacon authorizing arbitration and the place thereof to be provided in its bill of lading agreement.

I

THE LANGUAGE OF THE INTERSTATE COMMERCE ACT 49 USC 20(11) DOES NOT PRECLUDE CARRIER-SHIPPER AGREEMENTS ON ARBITRATION

In order to find the arbitration agreement herein in conflict with 49 U.S.C. 20(11), the Second Circuit was obligated to find language creating "venue liability", i.e., language prohibiting carrier-shipper stipulations concerning the forum for settling disputes. But, since Congress did not specifically prohibit provisions affecting the forum for settling disputes in 20(11), the Second Circuit found as its basic premise that 20(11) prohibited any and all limitations on carriers' liability to shippers — thereby encompassing "venue liability".

But, all that Congress did in enacting 49 U.S.C. Section

20(11) as noted by the District Court below, was to prohibit limits on the amount of damages shippers could recover. However, such prohibition on "damage limits" rather than "general liability limits", has been recognized by courts, including the Second Circuit, as creating neither "all-inclusive" liability nor venue liability. *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556, 558 (2d Cir. 1949).

The following discussion documents that Congress did not enact, and did not intend to enact, language that would result in either the broad prohibition on limits of liability necessary to the Second Circuit's conclusion, nor specific language prohibiting stipulations as to the forum for settling disputes. In fact, as set forth below, Congress enacted legislation recognizing contractual limitations on carrier liability and restricting shipper's choice of venue in litigation against carriers.

The Language of the Act

The language of 49 U.S.C. Section 20(11) does not, by its terms, bar arbitration at a given location. The opinion of the Court of Appeals below does not cite any specific prohibition of venue limitation in the Interstate Commerce Act, 49 U.S.C. Section 20(11). Rather, a portion of 49 U.S.C. Section 20(11) is deemed by the Second Circuit to create an all-inclusive limitation on the restriction of carrier liability — impliedly creating venue liability. However, the language that the Second Circuit relies on:

> ". . .'any limitation of liability or limitation of the amount of recovery . . . without respect to the manner or form in which it is sought to be made' is 'unlawful and void' ".

does not stand alone. It is *immediately preceded* by the word "notwithstanding" and the entire phrase only makes sense in a fuller reading of 49 U.S.C. Section 20(11). Such a reading — the one given by its author, as fully discussed

below, indicates beyond peradventure that the statutory language solely and only prohibited limitations by carriers on the *amount of damages* for which carriers are liable. The fuller statutory language reads:

> ". . . any . . . common carrier . . . shall be liable to the lawful holder of said receipt or bill of lading . . . for the *full actual loss, damage or injury* to such property caused by it . . . notwithstanding any limitation of liability or limitation of the amount of recovery . . . and any *such* limitation without respect to the manner or form in which it is sought to be made is declared to be unlawful and void." (Emphasis added)

Since the phrase "notwithstanding any limitation of liability" modifies language of the Act specifying the *amount of damages for which a carrier is liable,* the language is not "all inclusive" and does not support the Second Circuit's position. Cf. *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556, 558 (2d Cir. 1949). A review of authorities construing this Statutory language, which follows, also confirns this view.

Interpretations of the Carmack Amendment Language

The original Carmack Amendment to the Hepburn Act 1906 did not have the language "notwithstanding any limitation of liability".

The Carmack Amendment of 1906 read, in relevant part:

> "any common carrier . . . receiving property for (interstate) transportation . . . shall be liable to the lawful holder (of a bill of lading) for any loss, damage or injury to such property . . . caused by it (or by a connecting carrier). . . and no contract, receipt, rule or regulation shall except such

> common carrier . . . from the liability hereby imposed . . . " (Bracketed language added.)

The Supreme Court held that the Carmack Amendment did not create all-inclusive liability. In *Missouri, Kansas & Texas Ry. v. Harriman,* 227 U S. 657 (1913), the Supreme Court defined liability as enacted in the Carmack Amendment as follows:

> "The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hpeburn Act of June 29, 1906."

Id. at 672. This liability for "loss or damage" is not the all-inclusive type found in FELA or the Securities Act cited by the Second Circuit below.

When, in 1916, Congress added statutory language to 49 U.S. Code Sec. 20(11) covering baggage liability, it also summarized the Carmack Amendment. That summary clearly indicates that Congress viewed the Carmack Amendment as dealing only with prohibitions against limitations on damages:

> "The provisions of respecting liability for *full actual loss, damage* or injury notwithstanding any limitation of liability or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void shall not apply, first, to baggage . . ." (Emphasis added)

Additionally, the Interstate Commerce Commission, in reviewing the language of the Carmack Amendment has rejected the "all-inclusive" approach in limitations of carrier liability and found that it merely added an additional potential defendant:

> "*The prime if not the only purpose of the Carmack Amendment was to make the initial carrier*

> *receiving property for interstate transportation liable to the lawful holder of a receipt or bill of lading issued therefore on account of any loss, damage or injury* to such property caused by it or by any other common carrier over whose lines the same might pass. Prior to that time the shipper or consignee was put to the trouble and expense of attempting to locate among those comprising the through line of movement the particular carrier responsible for any loss or damage occurring to the shipment and endeavoring to collect from it. It was generally difficult and often impossible to definitely *ascertain the particular carrier* in the through line which had caused the loss or damage, and it was the inadequate opportunity afforded under these conditions for enforcing justice that led to the enactment of this amendment of the law. *It did not undertake directly to prescribe or limit the conditions or provisions of bills of lading,* but operated to render void to the extent stated any attempted limitation of the liability of the initial carrier to the shipper." (Emphasis added)

Louisiana State Rice Milling Co. v. M.L. & T.R.R. & S.S. Co., 34 ICC 512 (1915). *Accord: Bills of Lading,* 52 ICC 678 (1919).

The Commission cited as an example of valid limitations placed in contracts by carriers "shipper load and count" provisions (i.e., that carriers are not liable for damages in excess of contractual recitations in bill of lading agreements as to quantity shipped), despite the language of the Carmack Amendment. The Commission continued:

> "We do not think, however, that the 'shipper's load and count' provision here in question is such a limitation upon carrier's liability as is contemplated by the prohibition of this amendment. It

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> does not appear that this rule operates to limit the *liability of the carrier for the full value* of the property shipped but, in its application to a claim for loss because of alleged failure to deliver the whole amount transported, has the effect of placing the burden upon the shipper who loads on his private sidetrack to prove that the amount specified was loaded and that a less amount was taken out of the car by the consignee . . ." (Emphasis added)

Id. at 513.

Clearly then, these authorities did not view the Carmack Amendment as altering carrier's liability by inclusively prohibiting all contractual limitations thereon.

II

THE LEGISLATIVE HISTORY OF 49 U.S.C. SEC. 20(11) DOES NOT SUPPORT SECOND CIRCUIT RULING

The Second Circuit cited the Congressional Record quoted in *Atlantic Coastline v. Riverside Mills,* 219 U.S. 186 (1911) to support its assertion that Congress intended to expand and protect the venue of shipper litigation against carriers. But, a fuller reading of the quotation of the Congressional Record in *Atlantic Coastline,* demonstrates that Congress was discussing who (between the initial and delivering carrier) was liable and not where litigation could be brought. The full quotation of that section, with the omitted language in italics, is as follows:

> "*This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress untertook to regulate. Thus when*

> *this Carmack amendment was reported by a conference committee, Judge William Richardson, a Congressman from Alabama, speaking for the committee of the matter which it was sought to remedy, among other things, said:*
>
> "One of the great complaints of the railroads has been — and, I think, a reasonable, just and fair complaint — that when a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at which he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. *Why? The reasons for inducing us to do that were that the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement the concert, the cooperation, the through route courtesies between them would be broken up if prompt payment were not made. We have done that in conference.*" (Cong. Rec. Pt. 10, p. 9580.)"

The Congressional intent is clear: shippers no longer had to prove which carrier of several connecting carriers was at fault for damage to cargo. *No mention is made of venue.* In fact, the very Federal decisions which have held that 49 U.S.C. Section 20(11) restricts the venue of shipper claims

against carriers cite *Atlantic Coastline: Litvak Meat Co. v. Baker,* 466 F.2d 329 (10th Cir. 1971); *W.D. Lawson & Co. v. Penn Central,* 456 F.2d 419 (6th Cir. 1972); *Pratt v. Denver R. & GWR Co.,* 284 Fed. 1007 (DC Minn. 1922).

The Cummins Amendment

The Second Circuit has cited the Congressional debates preceding the Cummins Amendment to this portion of the Interstate Commerce Act to support its holding that all limitations of carrier liability — including "venue liability" — are precluded by 49 U.S.C. Section 20(11). However, a review of the Cummins Amendment language and history suggests the contrary.

As noted above, the Supreme Court in *Missouri, Kansas & Texas Ry. v. Harriman,* 227 U.S. 657 (1913) and *Adams Express v. Cronninger,* 226 U.S. 491 (1913) reviewed the Carmack Amendment. The Supreme Court held that the Carmack Amendment did not prohibit (1) limits on the amount of damage recovery, (2) conditions precedent to recovery, or (3) periods of limitation on litigation. While Congress thereafter enacted the Cummins Amendment to prohibit carriers from limiting the amount of damage recovery of shippers, it is important to note that Congress did not preclude carriers from providing conditions precedent or periods of limitation in shipping contracts. If the premise of the Second Circuit's opinion were true (that the Cummins Amendment was an all-inclusive prohibition on liability restrictions by carriers), the Cummins Amendment would have prohibited these contract restrictions on litigation as well as damage limitations.

As one authority has noted, all that the Cummins Amendment did was to "abolish the system of released rates based on agreed valuations" and to give the Commission authority to approve such released rate limits of

liability for the amount of damage recovery, *Knorst,* 1 *Interstate Commerce Law & Practice* 102 (1953). A similar view was taken by the Interstate Commerce Commission *Bills of Lading,* 52 ICC 678 (1919). In fact, Senator Cummins characterized his bill solely to be an answer to the problem of damage value limits:

> "In this bill we have tried to restore to shippers of this country *not all, but a measure,* of the rights which they possessed and which they exercised prior to the passage of the Carmack Amendment which inadvertently destroyed those rights. Therefore we provided that the railroad company should be liable to the lawful holder of the receipt or any other person *for the full actual loss,* damage, or injury caused by it '*—notwithstanding any limitation of liability or limitations of the amount of recovery or representations or agreements as to value in any such* receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission, and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void'." (Emphasis added) 51 Cong. Rec. 9621 (1914).

Significantly, Senator Cummins' reading of the language of the amendment, "any limitation of liability" with the antecedent "notwithstanding", is that it directly modified the phrase making carriers liable for the "full actual" amount of damages. He did not read it as either standing alone or prohibiting all restrictions in carrier liability contrary to the Second Circuit's reading (4107).

Senator Cummins went on to state that the sole purpose of his amendment was to prohibit carriers' restrictions on the extent of damage recovery:

"*The very purpose of the bill is to prohibit the agreement with regard to a release of value* to a certain point . . . (U)nder the (current) practice of the railroad company . . . the shipper must accept his indemnity or his damages based upon this *released value, or diminished value. The purpose is to put an end to that practice.* It began since 1906, and it ought not to continue." (Emphasis and bracketed language added.) 51 Cong. Rec. 9621, 9622 (1914).

***

"*I do not desire to make the railroad companies liable under circumstances which they are now not liable;* but, being liable, I want to make them *pay the full value* of the articles for which they may be responsible". 51 Cong. Rec. 9625, 9626. (Emphasis added)

Senator Cummins also recognized that contract limitations on shipper claims, such as limitations on hidden damage claims, were still valid:

"I was about to say, in cases where goods so offered to a common carrier are hidden or boxed, it is impossible for the carrier to know what it is receiving. So we all thought, and I am sure you will all think, that *it would be fair and reasonable for the carrier to stipulate a limitation upon its liability.*" 51 Cong. Rec. 9622 (Emphasis added)

Senator Sutherland's colloquy with Senator Cummins, a part of which was quoted by the Second Circuit (4110), when considered more fully, shows that he, too, sought to assure that the prohibition on limitations was, in fact, limited solely to restrictions of amount of damages and not to all limitations on carrier liabilities:

"Mr. SUTHERLAND. If the Senator's amendment should be adopted, would not the effect of it be to broaden the liability of the carrier beyond the common-law liability, and to make it liable even though the loss might be occasioned by the public enemy or by an act of God?

"Mr. CUMMINS: Mr. President, may I answer that question? I do not think it would, because *the purpose of this bill* is to leave the liability of the carrier untouched and unaffected by any agreement for limitation growing out of a representation or agreement *as to value.*

***

"(U)nder the common law, as declared by the Supreme Court of the United States (in *Adams Express v. Croninger,* 226 U.S. 491 (1913), there can be a limitation upon *the amount of recovery upon a statement of value.* I want to get rid of the part of the common law, but not the part of the common law that . . . the common carrier shall not be liable in the event of injuries caused by the act of Providence or the public enemy." (Emphasis and bracketed language added) 51 Cong. Rec. 9625, 9626

These quotations demonstrate that Congress did not intend the Cummins Amendment to prohibit all limitations of carriers' liability, as has been asserted by the Second Circuit. As noted elsewhere herein, statutes prohibiting damage limitations do not create venue liability or have any all-inclusive effect. *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556, 558 (2d Cir. 1949).

The Second Circuit has acknowledged that the Cummins Amendment "also added provisos relating to the time for giving of notice and filing of claims and the institution of suit . . ." (4109, 4110). However, the Second Circuit failed to consider that if the Cummins Amendment precluded all limitations on liability, further restrictions of conditions precedent would have been obviated. But, the Cummins Amendment did recognize as valid, contracts providing

conditions precedent and periods of limitation on shipper claims litigation. *Missouri Pac. R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964), *Delphi Frosted Foods Corp. v. Ill. Cent. R. Co.*, 188 F.2d 343 (CA Ky. 1951).

The contractual conditions precedent to shipper litigation and period of limitations thereon—both of which are "limits of liability"—have been at all times enforced under 49 U.S.C. Section 20(11), from the original enactment of the Carmack Amendment to the present. *A fortiori*, an agreement providing for arbitration as authorized by the Federal Arbitration Act, which does not constitute a condition precedent to the commencement of litigation but merely provides for disposition of the merits of the dispute at a given location, is not precluded by 49 U.S.C. Section 20(11).

The Newton Amendment

The Second Circuit also quoted a portion of the Congressional Record concerning the Newton Amendment (4110) to support its conclusion that Congress created venue expansion for shippers' benefit. Yet, a review of the statute itself and the full remarks of Congressman Newton, so cited, indicate that not only did Congress restrict the venue in which shippers could bring action, but Congress enacted that provision at the behest of, and for the benefit of, *carriers* and not, as the Second Circuit suggests (4111), for the benefit of shippers.

Congress added the Newton Amendment to make the delivering carrier liable to a shipper without proving whether it or the initial carrier was at fault. In doing so, Congress balanced this added expansion of *who* might be sued by restricting *where* litigation could be brought. Carriers could only be sued at certain locations:

> ". . . if in a district court of the United States, only in a district, and if in a State court, only in a State

> through or into which the defendant carrier operates a line of railroad."

Congressman Newton specifically stated that this was added for the benefit of carriers:

> "Mr. NEWTON of Minnesota. Yes. In view of this change (permitting shippers to sue carriers regardless of fault) the committee thought it but fair to include a provision providing that the commencement of actions against the delivering carrier should be brought in a State where that carrier was operating a line of railway, so that the carrier could not be forced to stand suit at some distant point far away from where its witnesses would be available." (Emphasis and bracketed material added) 67 Cong. Rec. 12759 (1926).

Clearly, the statute and the Congressional history do not support the holding of the Second Circuit that the carriers were required to stand suit wherever brought. (4108) In fact, at the time of the enactment of the Newton Amendment, Congressman Huddleston complained about the language of the Newton Amendment which restricted the venue in which carriers could be sued:

> "Mr. HUDDLESTON . . . (T)here are literally hundreds of points throughout the United States in which each of the carriers operate, so far as the essential features of operations are concerned, yet, in which they have no lines of railroad. And as to those instances the suit against the delivering carrier at those points is forbidden under this proviso.
>
> ***
>
> "I hold that, as a matter of principle, where the delivering carrier is liable as this bill makes it liable, the carrier ought to be subject to be sued in any court which is proper for the assertion of the

> right of the plaintiff. In other words, we ought not to say that the carrier shall be liable for *a certain damage* but the plaintiff shall assert his rights in certain courts suited to the *convenience of the carrier.*" (Emphasis added) 67 Cong. Rec. 12759, 12763.

Congress saw fit in enacting the Newton Amendment to reject the complaint of Mr. Huddleston and his attempts to change the restriction on venue of shipper suits against carriers.

Congressman Newton's remarks quoted by the Second Circuit are but a portion of his defense of the bill against the foregoing attacks of Congressman Huddleston. Immediately after the language cited by the Second Circuit Court (4110), Congressman Newton reiterated that the restriction of venue was for the benefit of carriers:

> ". . . The committee thought that in granting this additional right (to sue the delivering carrier regardless of fault) that *it would be better to accept the suggestion of the carriers in making this limitation as to forum where the suit must be brought.* There is no question but what at times *carriers have been compelled to defend suits against them at places where they maintained an office.* Jurisdiction is obtained for service of process. It is far away from where the witnesses are, whether those witnesses appear for the carrier or shipper." (Emphasis and bracketed language added) 67 Cong. Rec. 12764.

Clearly, the Second Circuit erred in failing to recognize that, while the Carmack Amendment and Newton Amendment gave shippers a greater number of *entities* to sue (delivering and initial carriers), it restricted venue of suit. *W.D. Lawson & Co. v. Penn Central,* 456 F.2d 419, 423 (6th Cir. 1972). *Litvak Meat Co. v. Baker,* 466 F.2d

329, 337 (10th Cir. 1971).*

The balance so created by Congress in enacting carriers' rights liabilities in the Newton Amendment ought not to be overridden by judicial extension.

III

THE FELA CASES DO NOT SUPPORT THE SECOND CIRCUIT'S VIEW

The Second Circuit suggested an analogy between 49 U.S.C. Section 20(11), and the provisions of the Federal Employers' Liability Act (FELA) 45 U.S.C. Sections 55 and 56, and cases decided thereunder. However, the Second Circuit failed to consider several vital differences between cases under 49 U.S.C. Section 20(11) and the FELA authorities:

a. FELA, by its terms, expands venue in which a plaintiff

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*The Second Circuit in referring (4117) to *Litvak Meat Co. v. Baker,* 466 F.2d 329 (10th Cir. 1971) which upheld the restrictive venue in Carmack Amendment suits, suggested that ordinary venue rules are available in "negligence" suits by shippers against carriers, i.e., that in a suit under a theory of negligence rather than bailment, carriers are amenable to suit in any available jurisdiction. Such a view is untenable. That language in the *Litvak* case has been repudiated by subsequent decisions of the courts in that Circuit *Sweeney v. Morgan Drive Away, Inc.,* 394 F.Supp. 216 (DC Colo. 1975); and well reasoned opinions of other courts *Sylgab Steel & Wire Co. v. Strickland Transportation Co.,* 270 F.Supp. 264 (EDNY 1967). *Litvak* apparently relied upon the language of the Cummins Amendment, no longer part of 49 U.S. Code 20(11), eliminating the need for written notice of claim by shipper where the theory of recovery was negligence. Accordingly, the Second Circuit erred in stating (4110) that an action in negligence against an interstate carrier would not be subject to the conditions precedent of written notice provided in the Uniform Bill of Lading or the restrictions on the venue of litigation contained in the Newton Amendment. *Baltimore & Ohio Co. v. Leach,* 249 U.S. 317 (1919), *B.A. Walterman Co. v. Pennsylvania R.R. Co.,* 295 F.2d 627 (6th Cir. 1961); *American Synthetic Corp. v. Louisville & Nashville R.R. Co.,* 422 F.2d 462, 468 (10th Cir. 1970).

may sue an employer under 45 U.S. Code Sec. 55. On the contrary, as noted above, 49 U.S. Code 20(11) restricts venue.

b. Specific language of the FELA, 45 U.S.C. Sec. 56, protects against waiver of "any provisions of the chapter", including those venue expansive provisions of aforementioned. 45 U.S. Code 55. On the contrary, the Interstate Commerce Act does not limit lawful restrictions on litigation—merely restrictions on the amount of damage recovery.

c. The FELA, by its terms and by Congressional intent, changes the substantive rights of parties under the common law. On the contrary, the Interstate Commerce Act by its terms specifically maintains the rights and liabilities of the parties at common law. *Missouri Pacific R. Co. v. Elmore Stahl.* 377 U S. 134 (1964).

d. The FELA cases concern claims arising during employment in interstate commerce. In the Federal Arbitration Act, 9 U.S.C. Section 1, arbitration of employees' rights was specifically excluded from arbitration. *Tenny Engineering v. United Electric R.M. Workers of America, Local 437.* 207 F.2d 450 (3rd Cir. 1953). No similar exemption exists for shipper-carrier disputes. Indeed, the clear Congressional intent to specifically include claims concerning the interstate shipment of goods within the scope of the Federal Arbitration Act is found in the Congressional report on the Federal Arbitration Act:

> ". . . the control over interstate commerce (one of the basis for the legislation) reaches not only *the actual physical interstate shipment of goods* but also contracts relating to interstate commerce." HR Rep. No. 96 68th Cong. 1st. Sess. 1. (Emphasis supplied)

Clearly, the FELA cases cited by the Second Circuit do not present an analogous situation to the instant case. In

fact, decisions under FELA support petitioner's position. As noted above, *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556 (2d Cir. 1949) set forth a clear rule: if a statute was to be construed as prohibiting restrictions on the forum for settling disputes where venue was not mentioned, the statute had to prohibit all limitations on liability. In other words, the statute had to be prophylactic to find "venue implied liability". On the other hand, *Krenger* recognized that where a statute merely prohibited limitations *on damages* it would not be construed as prophylactic:

> "Significance should be attached to the inclusive nature of the statutory phrase — '*any liability* created by this chapter.' (Found in FELA 45 USC 55). Had a restricted meaning been intended, it would surely have been simple, indeed, to limit the statutory provisions to the *duty to pay damages.* (Emphasis in original text, bracketed language added) *Id.* at 558.

The preceding discussion of the Interstate Commerce Act, 49 U.S.C. Sec. 20(11), shows that the phrase prohibiting limitations refers only to liability for damages — the very statutory language which the Court in *Krenger* said does not interfere with conditions precedent, stipulations on the forum for settling disputes or any lawful contract terms or conditions. *Accord: Missouri, Kansas & Texas Ry. v. Harriman,* 227 U.S. 657 (1913); *Oregon-Washington Co. v. McGinn,* 258 U.S. 409, 416 (1922).

Similarly, if one compares the citation by the Second Circuit of *Duncan v. Thompson,* 315 U.S. 1 (1941), decided under the FELA, with *Missouri, Kansas & Texas Ry. v. Harriman, supra,* decided under the Interstate Commerce Act, it is clear that the cases reach opposite conclusions *because the statutes upon which they are based have differing provisions.* The Supreme Court, in *Duncan,* considering the FELA, held that the prophylactic language

therein prohibited any conditions precedent to litigation because the statute (FELA) is venue expansive and because FELA prohibited waiver of any "liability created by the chapter". Conversely, the Supreme Court in *Missouri, Kansas, supra,* considering a similar argument under the provisions of the Interstate Commerce Act held that conditions precedent to the commencement of litigation were not barred by the language of the Act. Said conditions precedent are still lawful thereunder.

The Court in *Krenger* also noted that the language of the FELA, 45 U.S.C. Section 55, protecting "*any liability created by this chapter*", was a specific protection of the venue expansive language of the 45 U.S.C. Section 56 of the FELA. *Krenger* emphasized this rationale for its decision:

> "The *importance* of this *extensive choice of venue* to injured railroad workers is no secret; it was fully set forth by Senator Borah in sponsoring the Amendment of 1910 which *granted the choice* — a bit of legislative history recently recounted at length in decisions reenforcing the option *against suggested judicial limitations.*" (Emphasis added)

The same rationale is found in *Wilko v. Swan,* 346 U.S. 427 (1953).

By comparison, it is clear that, unlike the FELA cases, the Interstate Commerce Act for over the last 50 years has been deemed to restrict venue. Accordingly, the reliance by the Second Circuit on FELA authorities was error.

IV

ARBITRATION IS VALID UNDER STATUTES WITH VENUE AND LIABILITY PROVISIONS SIMILAR TO THE INTERSTATE COMMERCE ACT

Arbitration at a given location has been held valid under statutes similar in language and intent to the Interstate Commerce Act, such as the Miller Act, 40 U.S.C. Section 270(b) and the Carriage of Goods by Sea Act, 46 U.S.C. Section 1303. Both the Miller Act, 40 U.S.C. Section 270(b) and the Carriage of Goods by Sea Act, 46 U.S.C. Section 1303, by their terms, parallel the Carmack Amendment. In cases thereunder, arbitration at a location other than the one in which litigation was commenced was held valid and consistent with the statutory rights of claimants.

The Miller Act, 40 U.S.C. Section 270(b) contains language similar to the Interstate Commerce Act. Indeed, unlike the Interstate Commerce Act, which did not create any additional causes of action in favor of shipper-claimants,* the Miller Act even provides subcontractor-claimants with a specific right to sue:

> "Every person who has furnished labor or material . . . in respect of which a payment bond is furnished under section 270a . . . shall have the right to sue on such payment bond for the amount . . . Every suit instituted under this section shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere irrespective of the amount in controversy in such suit . . ."

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*J. & H. Flyer, Inc. v. Pennsylvania RR Co., 316 F.2d 203, 205 (1963).

In cases under the Miller Act, such as *United States v. Eric Elevator Corp.*, 214 F.Supp. 945 (DC Mass. 1963), the Federal Courts have upheld arbitration at distant forums as not inconsistent with the Miller Act:

> "Plaintiff argues, however, that the arbitration clause involved here is invalid because it provides for arbitration in New York. Its contention seems to be that since the Miller Act requires that any suit under its provision shall be brought in the district in which the contract was to be performed, any arbitration must be had only in that district. Such a contention was rejected in *Electronic Missile Facilities, Inc. v. United States for Use of H.W. Moseley*, 5 Cir. 306 F.2d 554 and *United States for Use and Benefit of Seaboard Surety Company v. Electronic and Missile Facilities, Inc.*, D.C. 206 F. Supp. 790.
>
> * * *
>
> "If plaintiff can agree to waive this right and submit the case for decision by an arbitration tribunal, he should certainly be able to agree to have the arbitration take place outside the district. The Arbitration Act leaves the parties free to determine by their own agreement how and where arbitration shall be conducted, and the court which may confirm the award, 9 U.S.C.A. Sec. 9. The fact that arbitration under the agreement is to be conducted outside the jurisdiction is no bar to the grant by this court of a stay pending arbitration at the place fixed by the agreement of the parties. *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 452, 453, 55 S.Ct. 313, 79 L.Ed. 647."

Similar decisions under the Carriage of Goods by Sea Act ("COGSA") uphold the validity of arbitration at another forum. Language similar to the Interstate Commerce Act is found in COGSA. 46 U.S.C. Section 190 prohibits restriction of liability for loss or damage to shipper's goods:

> ". . . in any bill of lading or shipping document *relieving carriers from liability for loss or damage from negligence, fault,* or failure in *proper loading, stowage, custody, care or proper delivery* of any and all lawful merchandise or property committed to its or their charge. Any, *and all words and clauses of such import* inserted in bills of lading or shipping receipts shall be *null and void* and of no effect." (Emphasis added)

46 U.S.C. Section 1303(8) also provides, in part:

> "*Any clause,* covenant, or agreement in a contract of carriage *relieving the carrier or the ship from liability for loss or damage to or in connection with goods,* arising from negligence, fault, or failure in the duties and obligations provided in this section, or *lessening such liability* otherwise than as provided in this chapter, *shall be null and void* and of no effect." (Emphasis added)

COGSA, like the Interstate Commerce Act, also regulates conditions precedent to shipper litigation against carriers and stipulated periods of limitations thereon. However, in a decision arising under COGSA, the Second Circuit in *Indussa Corporation v. SS. Ranborg*, 377 F.2d 200 (2d Cir. 1967) disposed of the same argument that State Farm raised below: that an agreement for arbitration at a forum other than the place chosen by a claimant in litigation voids liability in a manner prohibited by statute.

As noted by the District Court below, *Indussa* distinguished between the unlawfulness of a provision in a bill of lading restricting *litigation* to another forum, and the lawfulness and validity of a provision in a bill of lading providing *arbitration* in a forum other than the one in

which litigation was commenced:

> "Our ruling (holding illegal contract clauses requiring litigation to be brought at a foreign location) does not touch the question of *arbitration clauses in bills of lading which require* [*arbitration*] *to be held abroad. The validity of such a clause* in a charter party, or in a bill of lading, effectively incorporating such a clause in a charter party, has been frequently sustained. See *Lowry & Co. v. SS LeMoyne D'Iberville,* 253 F.Supp. 396 (SDNY 1966), appeal dismissed for want of jurisdiction, 372 F2d 123 (2d Cir. 1967) slip opinions 1103, and cases cited." (Emphasis and bracketed language added)

Moreover, the legal consequence of Congress enacting and reenacting the Federal Arbitration Act is to supersede any possible conflict with other prior legislation such as the Interstate Commerce Act. Thus, in *Indussa,* Judge Friendly, considering the history of the Federal Arbitration Act and the intent of Congress in enacting both the Federal Arbitration Act and COGSA, stated:

> "Although the Federal Arbitration Act adopted in 1925, 43 Stat. 883, validated a written arbitration provision, Sec. 1, COGSA, enacted in 1936, 49 Stat. 1207, made no reference to that forum of procedure. *If there be any inconsistency between the two acts, presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947.* See Knauth, Ocean Bills of Lading, supra, at 238-239." (Emphasis added)

By comparison, neither the Interstate Commerce Act, enacted in 1887, nor the Motor Carriers Act in 1935, mentions arbitration. Accordingly, to paraphrase Judge Friendly, the original enactment of the Federal Arbitration Act in 1925 and its re-enactment in 1947 likewise "would

prevail by virtue of its re-enactment as positive law in 1947" over the Interstate Commerce Act — if any conflict existed.

Yet, no conflict exists. In fact, the original Supreme Court case, rejecting attacks upon the Federal Arbitration Act, and its alleged interference with the parties' right to litigate disputes, concerned an arbitration clause incorporated in a carrier's bill of lading. *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263 (1931).

The Second Circuit's opinion below sought to mitigate the scope of *Indussa* by noting that the case itself struck down a contract provision limiting litigation (4112). However, the court in *Indussa* stated that provisions for arbitration at given locations are valid and are on a different footing from the provisions for litigation at a given location.

In another COGSA case, *Kurt Orban, Inc. v. SS. Clymena,* 3108 F.Supp. 1390 (SDNY 1970) the Court also upheld an arbitration clause in a bill of lading against the same arguments of unlawfulness of arbitration at distant forums (therein outside the United States):

> "The circumstance that the arbitration is to take place in a foreign country does not affect the right to stay herein, *nor deprive this Court of jurisdiction. Mannesmann Rohrleitungsbau v. S.S. Bernhard Howarldt,* 254 F.Supp. 278 (SDNY 1965); *The Quarrington Court,* 25 F.Supp. 665 (SDNY 1938). The United States Arbitration Act . . . was passed 'not to oust the jurisdiction of the courts but to provide for maintaining their jurisdiction while at the same time recognizing arbitration agreements as affirmative defenses and providing a forum for their specific enforcement'. *American Sugar Refining Co. v. The Anaconda,* 138 F.2d 765, 766-767 (5th Cir. 1943), aff'd 332 U.S. 42, 64 S.Ct. 863, 88 L.Ed. 117 (1944)." (Emphasis added)

Accord: International Refugee Organization v. Republic S.S. Corp., 93 F.Supp. 798 (DC Md. 1950) (arbitration in England), app. dismd 189 F.2d 858 (4th Cir.); *Hirsch Fabrics Corp. v. Southern Athletic Co.*, 98 F.Supp. 437 (DC Tenn. 1951) (arbitration in New York); *Caribbean S.S. Co. v. LaSociete Navale Caennaise,* 140 F.Supp. 16 (DC Va. 1956) (arbitration in England); *American Reserves Ins. Co. v. China Insurance Co.*, 297 N.Y. 322, 79 N.E.2d 425 (1947).

The Second Circuit went on to suggest that, while Section 2 of the Federal Arbitration Act specifically validates arbitration in maritime transactions, it does not do so for interstate motor carriers (4113). This distinction ignores the language and declared intent of the Federal Arbitration Act to apply to all contracts. To reiterate, Congress noted in its report thereon that arbitration has a wide application:

> ". . . the control over interstate commerce (one of the bases for the legislation) reaches not only *the actual physical interstate shipment of goods* but also contracts relating to interstate commerce." HR Rep. No. 96, 68th Cong. 1st Sess." (Emphasis added)

Finally, the Second Circuit suggests the distinction in *Indussa* between invalid litigation venue provisions and valid arbitration venue provisions is inapplicable because the contract herein is one of adhesion. The Court erred because, as noted elsewhere herein, the Interstate Commerce Commission has held in *Ex Parte 263,* 340 ICC 515, 587, 588 (1972) that arbitration provisions in carriers' bills of lading should be applied uniformly to all shippers, "on a non-selective, across-the-board basis in advance of the discovery of a dispute". Indeed, inasmuch as carriers are bound under 49 U.S.C. Sec. 316(d) to treat all shippers uniformly, the concept of separate contract negotiation,

inherent in non-adhesive agreements, in precluded by statute.

Even where the effect of a contract is to permit litigation at a given locale not otherwise available, the Supreme Court has enforced such a contract, *National Equipment Rental v. Szukhent.* 375 U.S. 311, 315, 316 (1964):

> "it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given Court, to permit notice to be served by the opposing party, or even to waive notice altogether."

In *National Equipment,* the contract was a two-page printed lease between a national corporation and a Michigan "dirt farmer" authorizing service of process and litigation in New York. It would appear that, in the instant case, a 28-line bold type contract providing for *arbitration,* as authorized by Congress, should be at least equally enforceable. *Farr & Co. v. Cia Inter-Continental De Navegaccion de Cuba,* 243 F.2d 342 (2d Cir., 1957).

V

THE LANGUAGE OF THE FEDERAL ARBITRATION ACT PRECLUDES THE SECOND CIRCUIT'S CONCLUSION

The Second Circuit erred in failing to consider that the Federal Arbitration Act, 9 U.S.C. Sec. 4, is a venue-mandating statute, wherein Congress has occupied the field by preempting the venue question entirely as a matter of law. Accordingly, since arbitration itself is lawful under 49 U.S.C. Section 20(11), State Farm's objection to the place of arbitration, which has been mandated by Congress, is rendered moot.

The sole place where arbitration proceedings can be ordered is not any place specified in the agreement. Rather, it is solely the place of filing the petition to compel arbitration. In the Federal Arbitration Act, 9 U.S.C. Section 4, Congress specifically provided, in relevant part:

> "The hearing and *proceedings*, under such agreement, *shall be within the district in which the petition* for an order directing such arbitration *is filed.*" (Emphasis added)

Questions of the location at which arbitration should be held and where proceedings to enforce arbitration may be had, are, therefore, governed exclusively by this Federal statutory language, which is clear, emphatic and mandatory. This language has been held to constitute a venue-mandating statue, by which Congress set aside court-made discretionary rules such as *forum non convcniens.*

In *Continental Grain Co. v. Dant & Russel,* 118 F2d 967 (9th Cir. 1941), a dispute arose under an agreement which, by its terms, provided for arbitration in New York. The court ordered arbitration in Oregon where the petition for arbitration was filed in that court:

> "The appellant challenges the right of the court to order the arbitration within the district of Oregon because such an order does not conform to agreement of the parties for an arbitration in New York. Prior to the enactment of the United States arbitration act (1925) such agreements could not be enforced in the courts of the United States. If there could be any doubt of the power of the legislature to limit the right of arbitration to one conducted within the jurisdiction of the district court ordering the arbitration, it must be dispelled by the consideration that Congress could attach any limitation it desired to the right to enforce arbitration in the federal courts, that it has made a

> condition that the arbitration be held in the district where the court sits, that the contract in question was executed with a knowledge that Congress had so provided, and that the appellant had invoked the jurisdiction of a court other than that having jurisdiction in New York to enforce the agreement."

Accord: Industrial Y Frutera Columbia v. The Brisk, 195 F2d 1015, 1016, 1017 (5th Cir. 1952).

Similarly, in *China Union Lines v. Steamship Co. of 1949,* 136 F. Supp 597 (SDNY 1955), where the parties provided for arbitration in New York, but the petition to compel arbitration was filed in Texas, the arbitration was ordered to be held in Texas:

> "As appears from the foregoing chronology of the proceedings, libellant filed its petition for an order directing arbitration in the Southern District of Texas. It did not file a similar petition in this district. The *only* district within which the arbitration could proceed by force of a petition and court order would be the Southern District of *Texas.*" (Emphasis added)

Accord: Lawn v. Franklin, 328 F. Supp. 791 (SDNY 1971) (per Gurfein, J.); *Farr & Co. v. Cia Intercontinental de Navegacion,* 243 F2d 342, 346 (2d Cir. 1957).

Thus, had the instant case merely involved an agreement for arbitration without mentioning the situs thereof, the proper place for arbitration would be New York, since the petition for an order compelling arbitration was filed there.

Clearly, where, as in the Federal Arbitration Act, Congress has mandated the place of arbitration, this overrides any contractual agreement or court-fashioned rule to the contrary:

"The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases . . . Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'

* * *

"Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power." (Citations omitted)

Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404-406 (1967).

It is evident that Congress, in making the provisions of 9 U.S. Code Sec. 4 mandatory, sought to eliminate and wrangling over the shifting of disputes concerning arbitration itself, which might otherwise tie up and delay the speedy, expeditious process that Congress intended arbitration to be.

The Second Circuit in *Aaacon v. Ninfo*, 490 F2d 83 (2d Cir. 1974), in a unanimous decision, held under 9 U.S.C. Section 4 that the Federal District Court in which the petition is filed must hear the issues and direct the parties to arbitrate solely in that district, and that motions for change of venue must be rejected as a matter of law:

"Since the agreement on its face provides for arbitration in New York and since the petition was filed in the Southern District of New York the statute mandates that the court below proceed

summarily to a trial of the issues as to the making of the agreement. *Aaacon Auto Transport, Inc. v. Teafatiller*, 334 F. Supp. 1042, 1044 (SDNY 1971); *Lawn v. Franklin*, 328 F. Supp. 791, 793 (SDNY 1971). It follows that *the court below lacked the power* to order the transfer of the case to Wisconsin. See *Farrill v. Wyatt*, 408 F2d 662, 664-65 (2d Cir. 1969)." (Emphasis added)

The Second Circuit below has asserted that *Aaacon v. Ninfo*, 490 F2d 83 (2d Cir. 1974) did not declare Aaacon's contract valid under 49 U.S. Code 20(11). That is true. However, what the Court failed to consider was that *Aaacon-Ninfo* recognized that, under the Congressional scheme of 9 U.S.C. Sec. 4, only the place of filing and not the place specified in a contract of arbitration governs the venue issue. That was the proposition for which it was cited by petitioner.

Accordingly, Aaacon argued below that, since the petition herein had been filed in the United States District Court for the Eastern District of New York, the question of the venue of arbitration is moot. Indeed, were arbitration unavailable, since State Farm and Aaacon are amenable to process in New York, Aaacon could have commenced litigation against State Farm in New York on its right to the benefit of insurance as well as the question of liability for the alleged damage.

The Second Circuit took this argument as an invitation by Aaacon for the Court to rewrite the contract. It was not. It was a request that the Court recognize that Congress preempted the question of arbitration and rendered the issue moot.

VI

THE DECISION OF THE SECOND CIRCUIT CREATES A CONFLICT BETWEEN THE CIRCUITS

The Second Circuit originally stated that no other Court had considered any issues relevant to the instant case. The record shows otherwise and the Second Circuit has issued a correction of that portion of its opinion which is set forth in Appendix No. 4.

In *Aaacon v. Jacobson*, 475 F.2d 1394 (3rd Cir. 1973), the Third Circuit unanimously rejected arguments, *inter alia:*

> 1. that 49 U.S.C. Section 20(11) prohibited the inclusion of the arbitration clause;
>
> 2. that arbitration deprived respondent Jacobson of her right to proceed by the litigation Jacobson commenced;
>
> 3. that the arbitration provision contained in the bill of lading was unconscionable and unreasonable. (121a)

The opinion of the Third Circuit in *Aaacon v. Jacobson* is set forth in Appendix No. 5.

Clearly, the Second Circuit erred in stating (4108) that the prior cases at the District Court and Court of Appeals levels have upheld the arbitration provision in question "without reference to Section 20(11)".*

*The sole case cited by the Second Circuit involving arbitration, *Aaacon v. Aluminum Products*, U.S.D.C. WD Okla., No. 74 Civ. 759-C, is currently on appeal to the Tenth Circuit Court of Appeals.

VII

AAACON IS NOT ESTOPPED FROM SEEKING ARBITRATION

The Second Circuit erred in two respects in stating that Aaacon was estopped from asserting the validity of the arbitration provision because it was allegedly bound by a June 15, 1971 letter from Commission employee McCarthy rejecting the filing thereof as a part of a tariff.

First, as the Second Circuit itself observed in footnote 14 (4114), the letter of Mr. McCarthy was "not a decision made by the Commission, a division, an individual commissioner or a board so as to qualify for Commission review . . ."

Yet, the Second Circuit went on to refer to the letter of Mr. McCarthy as a "present order" and, thereafter, as a final "act of the Commission". (4115). While the letter may be "final" in that it was not appealable, and could be superseded by a new tariff filing, it was not an act of "the Commission", as noted by the District Court below.

Second, as more fully discussed hereafter, when, in 1972, the Commission finally required claims procedures to be filed by carriers, the Commission reviewed and *accepted for filing* as part of Aaacon's claims tariff, a provision authorizing arbitration at a place specified in the bill of lading agreement.

The McCarthy Letter Was Not A Commission Order

As noted by the District Court, the McCarthy letter, the Thompson letter and the Hearing Officer's report were not final orders of the Commission. They did not meet the standards of *National Automatic Laundry and Cleaning Counsel v. Schultz*, 443 F.2d 689, 702 (CA DC 1971) for binding agency decisions. McCarthy's letter and Thompson's letter were neither:

a. a published opinion;
b. approved by the Commission agency head;
c. the product of deliberative processes, including outside presentation; or
d. a provision covering carriers over which issue the agency had asserted jurisdiction.

No administrative review of McCarthy's letter was permissible under 49 C.F.R. Section 1100.101. In fact, no authority for review of any action to be taken by the Commission under 49 U.S.C. Section 20(11) exists, because the Organization and Assignment of Work of the Commission Section 4.3(k) specifically omits any authorization to delegate determination under 49 U.S.C. Section 20(11). See: 2 *CCH Federal Carrier Reporter.* ¶7025-7

Further, Section 4.3(1) thereof limits Commission review of 49 U.S.C. Section 20(11) only to items relating to the authorization of "released rates and ratings" — which were not the subject of the McCarthy letter.*

Internal Minute No. 74, relied on by the Second Circuit to lend authority to the McCarthy letter, was an *internal* memorandum of the Commission that was never published nor made available to interstate carriers. It was, therefore, not binding upon them. Cf. 5 U.S.C. Section 552(a)(1) and (a)(2). Accordingly, Internal Minute No. 74 did not clothe Mr. McCarthy with authority to issue a final order of the Commission as noted by the District Court below.

The further statement of the Second Circuit, that

*The Second Circuit has suggested at footnote 14 (4114) that perhaps a general petition could have been filed by Aaacon under 49 CRF Sec. 1100.102. Inasmuch as the Second Circuit has recognized that the McCarthy letter was written during the pendency of *Ex Parte 263*, 340 ICC 515 (1972), the subsequent decision of the full Commission in *Ex Parte 263* overrode any actions or informal views of employees expressed during its pendency. No additional proceeding or general petition by Aaacon was necessary.

Aaacon was estopped by failing to appeal the McCarthy letter, is also erroneous. Aaacon did preserve its right to seek Commission review, and has sought Commission review of the validity of the McCarthy position set forth in his letter of June 15, 1971, in proceeding Mc-C-7287, which is currently on review in the Courts.

Mr. Thompson's 1974 comments on Tariff Rule 20 cited by the Second Circuit (4119) also fail to constitute an act of the Commission. As heretofore noted, the Second Circuit erred in failing to note that the Commission has never undertaken any action to set aside Tariff Rule 20, which is still in full force and effect, under Organization and Assignment of Work 4.3 (k).

In summary, the failure of Aaacon to again petition the Commission on the question of the validity of the arbitration contract provision, upon receipt of the McCarthy letter did not vest Mr. McCarthy with authority he did not otherwise have, i.e., it did not make his *act* an "act of the Commission," it did not make his *letter* a Commission "order", nor was it appealable to the Commission, much less to the Courts, which a "final order" of the Commission would be.

The McCarthy Letter Was Superseded By Commission Tariff Filings

In June, 1971, when Aaacon filed the tariff provision which was rejected by Mr. McCarthy, no carrier was required to file any claims practices as part of its tariff. Carriers were only responsible to file tariff items *required* by 317(a) and only those tariff items which were so required to be filed and which were then rejected were void.

As discussed below, it was not until September, 1972 that the Commission, pursuant to its *Order in Ex Parte 263*, 340 ICC 515 (1972), for the first time required carriers

to file their claims practices as part of carrier's tariffs. Filing of claims rules tariffs prior to that date was not within the ambit of 49 U.S.C. Section 317(a). As noted by the District Court below, 49 U.S.C. Sections 316 and 317(a) could not provide a bases of decision in the instant private litigation. They deal solely with agency authority to move against carrier violations of the Interstate Commerce Act. As the Supreme Court stated *in T.I.M.E. Inc. v. U.S.*, 359 U.S. 464, 469 (1958):

> "The government urges that 49 U.S.C. 316(b) and (d) imposes a statutory duty on motor carriers not to charge or collect other than 'reasonable' rates, and asks us to imply a cause of action under the Motor Carrier Act for any shipper injured by violation of that duty. We cannot agree.
>
> As this Court recognized in *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 language of this sort in a statute which entrusts rate regulation to an *administrative agency in itself creates only a 'criterion for administrative application in determining a lawful rate' rather than a 'justiciable legal right'.*" (Bracketed language and emphasis added)

Clearly, under *T.I.M.E. Inc.*, the only body having jurisdiction over the reasonableness and lawfulness of the arbitration provision was the Commission itself. Until the Commission acts under 49 U.S.C. Section 316(e) to set aside or prohibit acts of carriers in futuro pursuant to the administrative standards set forth in 49 U.S.C. Section 317, they remain in full force and effect and no private cause of action to set them aside under 49 U.S.C. 317, is authorized.

As noted elsewhere herein, no action has ever been taken or commenced by the Commission to set aside Aaacon's Tariff Rule 20. The Commission proceeding in MC-C-7287, which is referred to in the Second Circuit's opinion,

was brought under Sections 204(c) and 212(a) of the Interstate Commerce Act, 49 USC Sections 304(c) & 312(a). MC-C-7287 is, therefore, not a Section 316(e) proceeding which is required before an approved tariff may be set aside.

Effects Affecting the McCarthy Letter's Rationale

To understand the significance of the "estoppel" issue, it is also necessary to consider the chronology of events prior and subsequent to the "rejection" letter on which the Second Circuit relies.

The facts are that Aaacon filed a tariff provision authorizing arbitration in 1971 which commission employee McCarthy rejected on two grounds:

a. that it was not provided for in the Uniform Bill of Lading terms and conditions, which he deemed to be "exclusive"; and

b. that it conflicted with the venue language of 49 U.S. Code 20(11) which he deemed to be "expansive".

The cases cited in McCarthy's letter were properly characterized by the District Court below as "factually distinguishable" from the instant case.

Aaacon took no further steps with regard to the letter because, as noted above, its tariff filing was not required to be made by carriers at that time. Since claims procedures were not required to be made part of tariffs, the June 15, 1971 letter was not a prohibiting act by the Commission. All it meant was that the rules on arbitration were not at that time made a part of Aaacon's tariff. In fact, the Commission subsequently questioned whether carriers need file arbitration provisions as part of their tariffs at all. *Ex Parte 263*, 340 ICC 515, 585 (1972).

After the June 15, 1971 letter, three events occurred which overturned the reasoning contained in that letter. First, the Commission approved arbitration of shipper-carrier claims in *Ex Parte* 263, 340 ICC 515, 578, et seq. (1972), a plenary proceeding started prior to June 15, 1971. The Second Circuit erred in indicating (4125) that the Commission has not determined whether or not arbitration "is inconsistent with Section 20 (11)". The Commission therein has stated that no inconsistency exists:

> "It is our view that when claims are not voluntarily paid by carriers the use of arbitration by the carriers, rather than resort to a court of law, is not proscribed by *any* portion of the Interstate Commerce Act." (Emphasis added)

Ex Parte 263, 340 ICC 515, 582 (1972).

The Commission in that same paragraph indicated that arbitration could be agreed to prior to the institution of the transportation service or after a claim has arisen. It raised a question as to whether tariff provisions for arbitration were even necessary. *Id.* at 585.

The second event overturning the McCarthy letter was that several Federal Courts of Appeals held that 49 U.S.Code 20(11) limited venue of shipper litigation. *Litvak Meat Co. v. Baker*, 466 F2d 329, 337 (10th Cir. 1971); *W.D. Lawson & Co. v. Penn Central*, 456 F2d 419, 423 (5th Cir. 1972); and

The third event was the Second Circuit and Third Circuit Courts of Appeals decisions upholding and enforcing the arbitration provision herein against attacks of exclusivity and conflict with 49 U.S. Code 20(11), respectively, in *Aacon v. Levine* 456 F2d 1335 (2d Cir. 1971), and *Aacon v. Jacobson*, 475 F2d 1394 (3rd Cir. 1973).

Commission Approval of Arbitration

On September 25, 1972, the Commission reviewed and approved a provision in Aaacon's Claims Tariff Rule 20, authorizing arbitration at a given location. The Tariff states in relevant part:

> "Carrier's bill of lading shall provide for arbitration, and situs thereof, pursuant to Federal law of unresolved disputes over loss and damage claims in advance of shipments."

Tariff Claim Rule 20, is and has been, at all times in effect since its approval by the Commission in 1972.

As to the Second Circuit's speculation that whether Rule 20 was "quite innocuous", implying that the Rule was invalid or unreviewed by the tariff examining branch of the Commission, the answer is that *the tariff examining branch not only reviewed the rule but made suggested changes in the language of the rule itself.*

In fact, the Chief of the Section of Tariffs reviewed the provision and *specifically required that it be made mandatory for "positive application"*. The requirement by the tariff reviewing agency of the Commission for "positive application" of the arbitration provision accorded with the Commission's holding in *Ex Parte 263* that arbitration must be available to all shipper-carrier disputes, and not just be selectively available only by shipper-carrier consent after a dispute has arisen:

> " . . . We are persuaded that the advantages of arbitration will be lost unless the remedy is available to shippers and carriers on a *non-selective, across-the-board basis in advance of the discovery of a dispute*". (Emphasis supplied), 340 ICC 587, 588 (1972).

Moreover, the actions of the Commission in approving a

tariff rule are deemed to be proper in the absence of evidence to the contrary, none of which was presented to the Second Circuit.

The Second Circuit erred in stating (4116) that the Commission did not propose legislation requiring arbitration. Said Commission proposed legislation is found, *inter alia*, at 340 ICC 515, 721 (1972) and S. 2012 (93rd Congress).

The Second Circuit also erred in failing to note that the Commission declined to adopt the hearing officer's conclusions in MC-C-7287 cited by the Second Circuit (4102, 4120). The Commission's order following 124 MC 514 requires compliance with *its* report, not that of the hearing officer. The Commission therein specifically declined to rule on the validity of arbitration at a given location 124 MCC 514.

Yet, the Second Circuit cites the report of hearing officer Reilly in MC-C-7287. Approval by the Commission of Aaacon's Tariff Rule 20 was not available to hearing officer Reilly when he wrote his report because it occurred after the close of the record in the proceeding MC-C-7287 and was not permitted to be subsequently admitted to the purview of the hearing examiner, despite Aaacon's attempt to introduce it by subsequent petition. Accordingly, his entire "decision" rested upon the letter of June 15, 1971 (which was superseded by the later Commission tariff approval). As the District Court below noted, the hearing officer's "decision" does nothing more than accompany his report of the evidence and was in no way binding upon the Commission, which reviewed the evidence and made its own conclusions.*

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*The Commission did state that its method of use by Aaacon might give rise to discouragement of filing of claims – an issue not here relevant since the claim of respondent was clearly filed and thoroughly prosecuted.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari to review the decision of the Second Circuit.

Respectfully submitted,

RALPH J. ZOLA
Attorney for Petitioner
228 West 41st Street
New York, N.Y. 10036
Tel. (212) 354-1444

APPENDIX 1 – ORDER AND DECISION OF ~~SECOND CIRCUIT~~ DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of the Arbitration
of Certain Differences Between

AAACON AUTO TRANSPORT, INC.,

Petitioner,

-and-

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY as subrogee
OF JOSEPH ROMAGNOLI,

Respondents.

ORDER SEPT. 16, 1975
74-C-739

COSTANTINO, D.J.

The petitioner having moved this court for an order pursuant to 9 U.S.C. §4, directing that arbitration of the above-captioned dispute between the parties be compelled in the manner provided in the Bill of Lading Agreement annexed to the moving papers, and for an order staying respondent from proceeding in the action at law commenced against the petitioner in the State of California pending arbitration, and said motion having regularly come on to be heard on November 13, 1974, and both sides having appeared and been heard, it is

ORDERED that respondents' claims against petitioner be

submitted to arbitration in New York City before an arbitrator to be selected by the American Arbitration Association and that the arbitration be conducted in accordance with the Bill of Lading Agreement and this court's Memorandum Decision dated July 21, 1975, and it is further

ORDERED that the two parties initially contribute equally to pay the arbitrator's fee. The arbitrator is to make as part of his award a final determination as to which party should pay the fee or as to the portion of the fee each party must pay; and it is further

ORDERED that the action pending in California between the parties is stayed until arbitration has been completed in New York and an award made by the arbitrator.

s/Mark A. Constantino
U.S.D.J.

MEMORANDUM DECISION

Zola and Zola, 228 West 41st Street, New York City 10036,
by Michael G. Ames, for petitioner

Williamson and Williamson, 225 Broadway, New York City 10007
by Walter Williamson, for respondent.

COSTANTINO, D.J.

This is a motion for an order pursuant to Title 9 U.S.C. §4 directing that respondents State Farm Mutual Automobile Insurance Company and Joseph Romagnoli be compelled to arbitrate in New York their claim against petitioner Aacon Auto Transport. State Farm is Romagnoli's subrogee. Petitioner also moves to stay an action brought by respondents in a California state court against petitioner.

The essential facts of the case may be easily summarized. Petitioner transports cars between various points throughout the United States. On or about June 21, 1972, petitioner and respondent Romagnoli (or his agent) entered into a Bill of Lading Agreement which provided that petitioner would transport Romagnoli's truck from South Carolina to California. The arrangements were made with petitioner's Atlanta, Georgia office. The Bill of Lading also contained the following provision:

> Any claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or performance or breach thereof shall be settled by arbitration in New York City.

In or about February 1974, respondent commenced an action in Municipal Court, County of Orange, California, to recover

damages of $1,527.27 allegedly sustained to the truck when it was in petitioner's possession. Romagnoli is now a California resident. Respondents allege that the truck was damaged in the State of Washington.

Respondents challenge the validity of the arbitration clause as applied to petitioner. This clause has been upheld in a number decisions in this Circuit, *e.g.*, *Aaacon Auto Transport v. Levine*, 456 F.2d 1335 (2d Cir. 1972); *Aaacon Auto Transport v. Bergmann*, Docket No. 74-C-436 (E.D.N.Y., bench decision August 9, 1974, order filed August 16, 1974); *Aaacon Auto Transport v. Bach*, Docket No. 72 Civ. 1076 (S.D.N.Y., filed June 29, 1972); *Aaacon Auto Transport v. Teafatilla*, 334 F. Supp. 1042 (S.D.N.Y. 1971).

The rule is that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. §2, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). A motion to compel arbitration under 9 U.S.C. §4 is simply a request for an order compelling specific performance of part of a contract. *In re Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F. Supp. 1013 (S.D.N.Y. 1971).

Respondents contend that the arbitration clause should not be enforced because it is unconscionable as applied to them. They contend that it is unconscionable because, in view of the expense of traveling from California to New York and the relatively small amount of respondents' claim, Romagnoli will not be able to testify in person at the arbitration in New York. In this court's view, Romagnoli's inability to testify in person at the New York arbitration does not make the arbitration clause unconscionable since his personal presence is not necessary for a fair settlement of respondent's claim. Aaacon states that it has no objection to Romagnoli sending a simple notarized letter to the arbitrator setting forth the facts of which he has personal knowledge. If Aaacon has any questions to pose to Romagnoli, it will pose them by letter [Petitioner's Supplemental Reply Affidavit ¶2.]. If State Farm's New York counsel believes after the arbitration

hearing is over that further information is needed from Mr. Romagnoli, he may seek the arbitrator's permission to submit an additional letter or affidavit from Romagnoli. If after the hearing the arbitrator decides that further information is needed from Romagnoli, such information also may be supplied by letter or affidavit. It is important to note that loss and damage claims like that of respondents lend themselves to evaluation on the basis of documentary evidence. The Interstate Commerce Commission has stated that "probably as many as 80 to 90 percent of the loss and damage claims are or can be processed to a satisfactory conclusion by carriers on documentary evidence alone." *Ex Parte No. 263 Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims*, 340 ICC 515 (1972); *see also* 340 ICC at 595. There is nothing to indicate that a documentary presentation of facts known to Romagnoli would not be sufficient to allow a just settlement of respondents' claim.

Several additional factors relating to the unconscionability issue should be noted. For one, respondent's interests may be adequately represented at the New York arbitration by State Farm's local counsel. This case is not simply an action by a California resident who may be effectively barred from relief because of a clause providing for arbitration in New York. Respondent State Farm is a national company with an office and local counsel in New York well able to protect respondents' interests.

It should also be observed that the contract was arranged in Georgia, the car was tendered to Aaacon in South Carolina, the alleged incident took place in the State of Washington, the driver resides in Wyoming, Aaacon's records and documents concerning this transportation as well as its claims personnel are in New York, and the owner of the vehicle resides in California. The foregoing indicates that no one state is an obviously better place to hold a hearing than any other from the standpoint of the convenience and expense of obtaining witnesses.

In addition, it should be noted that arbitration clauses similar

to that contained in Aaacon's Bill of Lading have been upheld in other cases, *e.g., Farr & Co. v. Cia Intercontinental De Navegacion De Cuba,* 243 F.2d 342 (2d Cir. 1957); *In re Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc.,* 334 F. Sup. 1013, 1021 (S.D.N.Y. 1971); *Lawn v. Franklin,* 328 F. Supp. 791, 793-94 (S.D.N.Y. 1971). In *Indussa Corp. v. S.S. Ranborg,* 377 F. 2d 200, 204 n. 4 (2d Cir. 1967) (dictum), Judge Friendly observed that the validity of arbitration clauses contained in bills of lading "has been frequently sustained."

A final factor to be considered with respect to the unconscionability issue is that it would be harmful and perhaps unjust to Aaacon to establish a rule that would require it to litigate loss and damage claims at great expense at various places around the country although it has sought to foreclose this possibility by requiring all customers to agree in advance to arbitrate their loss and damage claims in New York. Weighing the various factors, it is concluded that enforcement of the arbitration clause is not unconscionable in the factual context of this case. This court expresses, of course, no opinion as to whether enforcement of the clause might be unconscionable in a different factual context.

Respondents next contend that Aaacon's motion should be denied because the Interstate Commerce Commission has allegedly rejected Aaacon's arbitration clause. A letter from James A. McCarthy, Chief of the Section on Tariffs of the Interstate Commerce Commission, dated June 15, 1971 rejected a proposed page of Aaacon's tariff containing the arbitration clause. Mr. McCarthy's letter stated that the arbitration provision had the effect of limiting petitioner's statutory liability in violation of 49 U.S.C. §20(11). His position was based on a number of cases which are factually distinguishable from the instant case, *e.g., Illinois Central R.R. v. Crail,* 281 U.S. 57 (1930) which held that the lower court used the wrong measure in awarding damages resulting from a carrier's failure to deliver coal. McCarthy's letter also states that the arbitration provision is not a just and reasonable practice in violation of 49 U.S.C. §316(b).

Subsequent to the McCarthy letter, an Interstate Commerce Commission Administrative Judge named Joseph A. Reilly issued a decision dated November 30, 1973, recommending that Aaacon be ordered to cease and desist from the use of the arbitration clause. Aaacon filed numerous exceptions to the decision with the Commission. The Commission is evidently now reviewing the matter. It is clear that Judge Reilly's decision is not to be construed as an order of the Commission for the Certificate of Service attached to the decision states, "The parties to this proceeding are warned that it should not be assumed that the initial decision has become effective as the order of the Commission by operation of law until a notice to that effect has been received."

The latest position taken by an Interstate Commerce Commission official with respect to Aaacon's arbitration clause is contained in a letter dated July 11, 1974 to counsel for State Farm and Romagnoli from Mr. Charles E. Thompson, Chief of the Tariff Examining Branch. Although Mr. Thompson's letter is not a model of clarity, the position he apparently takes is that Aaacon's arbitration clause is of "doubtful" validity. Thompson's position may be compared with that taken by the Commission in *Ex Parte No. 263, Rules, Regulations, and Practices of Regular Carriers, with Respect to the Processing of Loss and Damage Claims,* 340 ICC 515 (1972). In the latter opinion, the Commission stated, "We can envision, for example, that a carrier . . . may be puzzled over the validity of [an arbitration clause contained in a bill of lading] if it has not filed with this Commission a tariff containing a . . . bill of lading form embracing the arbitration clause . . . " 340 ICC at 585. (The record indicates that the specific arbitration clause which respondents are challenging is not currently filed with the Commission). The opinion in *Ex Parte No. 263* went on to state:

> [This question of the arbitration clause] . . . cannot presently be resolved on this record . . . we think it would be most inappropriate for us to reach any conclusions thereon without the benefit of specific ex-

> pressions being received from interested and affected commercial, industrial, transportation, and governmental interests. Therefore, we shall defer resolution of [the question] to a future time in another proceeding to be instituted either upon the filing by an interested party or group of parties of an appropriate petition or upon our own motion after sufficient clarification of the issues involved has been obtained. Basically, however, we know of no inherent impediments to placing arbitration clauses in bills of lading for separate execution . . . The matter [of inserting arbitration clauses in bills of lading] is in a highly unsettled state . . . "

340 ICC at 586-587.

In sum, although Messrs. McCarthy and Thompson and Judge Reilly have expressed disapproval or doubt as to the validity of Aacon's arbitration clause, the Commission itself has taken no position on it. Respondents' contention that the Interstate Commerce Commission has rejected Aacon's arbitration clause is not, therefore, accurate.

Respondents further contend that limiting a claimant's remedy to arbitrate in New York is not a "just and reasonable" practice in violation of 49 U.S.C. §316(b). The general rule is that whenever a "practice is attacked as unreasonable . . . there must be preliminary resort to the [Interstate Commerce] Commission." *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1921). The reason for this is that the

> enquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts.

Great Northern Ry., 259 U.S. at 291. Thus, there is a genuine question as to whether this court, rather than the Interstate Commerce Commission, is the appropriate forum for respondents to raise the issue of whether Aacon's inclusion of an arbitration clause in its bill of lading is a "just and reasonable" practice. This question as to the appropriateness of the forum need not be reached here. Assuming, *arguendo*, that this is an appropriate forum, this court cannot agree on the basis of the record before it with respondent's contention that the arbitration clause is unjust or unreasonable in violation of 49 U.S.C. §316(b). It seems to this court that Aacon has exercised reasonable business judgment in choosing to limit its litigation expenses by requiring that each customer agree in advance to arbitration of claims in New York. Romagnoli had reasonable notice, either constructive or actual, of the arbitration clause since it was contained in readable print in the Bill of Lading Agreement which either he or his agent signed.

Respondents next contend that the arbitration clause limits petitioner's liability in violation of 49 U.S.C. §20(11) by allegedly requiring a shipper to travel to a distant point to press his claim. Assuming once again that this is the proper forum to present this contention, the contention is specious. The clause does not limit respondents' recovery of damages since the arbitrator may award the full measure of damages to which he finds they are entitled. Moreover, as noted above there is no need for the shipper, Romagnoli, to travel to New York.

Respondents next contend that the arbitration clause violates 49 U.S.C. §316(b) because it subjects petitioner's customers from states other than New York to "unjust discrimination o . . . undue or unreasonable prejudice or disadvantage." Indubitably, it is less practical for a customer residing in California than for a customer residing in New York to attend a New York arbitration. Respondents fail to show, however, why the arbitration provision results in unjust discrimination, undue or unreasonable prejudice or disadvantage in this case, i.e., there is no showing why the arbitrator cannot render a fair award of damages.

This case is factually distinguishable from those in which violations of 49 U.S.C. §316(d) were found. The latter include charging a higher rate for a shorter than a longer haul via the same carrier and over the same route, *Accelerated Transport-Pony Express v. United States,* 227 F. Supp. 815 (D. Vermont 1964), *aff'd* 379 U.S. 815 (1964); racial discrimination in serving food to interstate bus passengers at a restaurant operated as an integral part of a bus carrier's transportation service for interstate passengers, *Boynton v. Virginia,* 364 U.S. 454 (1960); racial segregation in rail and bus terminals, *United States v. City of Jackson, Mississippi,* 318 F. 2d 1 (5th Cir. 1963), *pet. for rehearing denied,* 320 F.2d 870 (5th Cir. 1963); maintaining racial segregation on buses and in bus terminals, *Lewis v. Greyhound Corp.,* 199 F. Supp. 210 (M.D. Ala., 1961).

Respondents advance a number of additional arguments which are unpersuasive. In view of the foregoing discussion, petitioner's motion to compel arbitration is hereby granted pursuant to 9 U.S.C. §4. If the parties cannot agree to an arbitrator within 30 days from the date of an order entered hereon they may apply to the court for the appointment of an arbitrator.

The California state court proceeding is enjoined pursuant to 28 U.S.C. §2283 since the injunction is necessary to protect or effectuate the order compelling arbitration. *Aaacon Auto Transport v. Bergmann,* Docket No. 74-C-436 (E.D.N.Y., bench decision August 9, 1974, order filed August 16, 1974); *Burger Chef Systems, Inc. v. Baldwin,* 365 F. Supp. 1229, 1233 (S.D.N.Y. 1973). This case is factually distinguishable from *In re Aaacon Auto Transport and Eichler,* 392 F. Supp. 926 (E.D.N.Y. 1975) where Judge Platt granted a motion to compel arbitration but refused to grant a stay of state court proceedings because of delaying tactics used by Aaacon. There, Aaacon unsuccessfully sought to remove the case from a Virginia state court to the federal district court of the Eastern District of Virginia before bringing the petition in federal court in New York. Judge Platt noted that the apparent purpose in attempting to remove the case to the federal court in Virginia was to harass

the plaintiff, delay proceedings, and obtain a "favorable forum." Judge Platt found that petitioner's effort to remove the case was contrary to the purposes of the Arbitration Act (9 U.S.C. §2-4) and he, accordingly, denied the application for the stay. An additional factor in Judge Platt's decision was that the state court action was docketed to start very shortly. In the instant case, there is no allegation that petitioner sought to remove respondents' state court action to a federal court in California.

Settle order on notice.

s/Mark A. Constantino
U.S.D.J.

APPENDIX 2 – OPINION OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 697—September Term, 1975.

(Argued March 26, 1976 Decided June 9, 1976.)

Docket No. 75-7585

In the Matter of the Arbitration
of Certain Differences Between

AAACON AUTO TRANSPORT, INC.,

Appellee,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
subrogee of JOSEPH ROMAGNOLI,

Appellant.

Before:

LUMBARD, OAKES and TIMBERS,

Circuit Judges.

Appeal from order of United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge,* directing that, pursuant to the contractual provision in the bill of lading, arbitration be deemed compulsory in claim for loss during interstate shipment of an automobile, and granting a stay of an action for recovery on the same claim in the California state court pending the result of arbitration.

Reversed.

WALTER WILLIAMSON, New York, N.Y. (Ronald J. Berk, New York, N.Y., on the brief), *for Appellant.*

RALPH ZOLA, New York, N.Y., *for Appellee.*

OAKES, *Circuit Judge:*

This appeal contests the validity under the Interstate Commerce Act, and under general equitable principles, of the arbitration clause in an interstate carrier's standard-form bill of lading utilized in connection with its nationwide business of transporting individually owned automobiles from point to point within the United States. The principal argument is that the arbitration clause is invalid because it compels private shippers to arbitrate their claims in New York, which may be entirely remote, inconvenient and expensive to them in connection with their claims. Since the amount of damages involved is usually in the vicinity of $1,000,[1] resulting from harm to the automobile en route while being driven by one of the carrier's casual drivers,[2] the cost of appearing in New York for arbitration frequently constitutes a bar, the argument runs, to pursuing even plainly valid claims. The specific order appealed from was granted by the United States

1 The vast majority of claims against Aaacon have been said to be under $1,000 by Administrative Law Judge Joseph A. Reilly in MC-C-7287 (Nov. 30, 1973) p. 8, affirmed in substance in *Aaacon Auto Transport, Inc.—Investigation and Revocation of Certificate,* 124 M.C.C. 493 (Div. 1, Apr. 7, 1976). Aaacon is self-insured and handles its own claims to the extent of the first $1,000. *Id.*

2 In the case at bar, as in many cases referred to by Administrative Law Judge Reilly, a casual driver who is referred to in the shipper's contract as an "independent contractor" is used, rather than an Aaacon employee. *Cf. Avis Rent a Car System, Inc.* v. *United States,* 503 F.2d 423 (2d Cir. 1974) ("car shuttlers" hired by Avis to move Avis cars between rental locations).

District Court for the Eastern District of New York, Mark A. Costantino, *Judge*. Pursuant to 9 U.S.C. § 4,[3] it directs that arbitration be compelled in the manner provided in the bill of lading, i.e., in New York. It also orders the respondent State Farm Mutual Automobile Insurance Co. (State Farm), as subrogee of Joseph Romagnoli, an automobile shipper, to stay proceedings in an action at law commenced against Aaacon in the State of California until arbitration has been completed.[4] Because we consider that the compulsory venue provision in connection with the arbitration is illegal and invalid, we reverse the judgment.

Aaacon Auto Transport, Inc. (Aaacon), is the interstate common motor carrier which is appellee. Its business is transporting individual, privately-owned vehicles throughout the continental United States. It advertises and has offices in all major United States cities, including Los Angeles, California, near where Mr. Romagnoli's vehicle was to be transported, where he now resides and where he sued Aaacon.

Mr. Romagnoli made arrangements in June of 1972 to have his 1971 Ford pick-up truck transported by Aaacon from Abbeville, South Carolina, to La Mirada, California, where he was being transferred by his employer. These

3 9 U.S.C. § 4 provides in part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

4 The question whether an injunction against the pending state court proceeding could properly be ordered by the district court has not been raised by either party at this appeal. *See* 28 U.S.C. § 2283. In view of our disposition of the merits in this case, we need not reach this troubling issue.

arrangements were made through Aaacon's office in Atlanta, Georgia. The shipper's contract or "freight bill-order form" on which Aaacon relies states that it is "subject to and incorporating all provisions of the carrier's bill of lading which is reproduced on reverse side hereof." On the reverse side of the freight bill there is a 28-line uniformly printed closely-packed statement wherein, *inter alia*, the shipper or shipper's agent consents to personal jurisdiction in New York state and federal courts and to service of process for commencement of any action by certified mail, and in which he agrees to a provision that "[a]ny claim or controversy, whether founded in contract or tort, arising out of or relating to this agreement or performance or breach thereof shall be settled by arbitration in New York City."[5]

Mr. Romagnoli's pick-up truck never arrived in southern California but was damaged in the state of Washington where it had been driven by the Aaacon driver. Romagnoli sued Aaacon in an Orange County, California, court to recover $1,157.20 damages allegedly incurred. As subrogee of Mr. Romagnoli for the major part of his claim, State Farm had a major interest in the California action and is the principal party here. While Aaacon would like to have us accordingly view the facts of the case as one between two business equals, we have to examine them from the

5 The bill of lading goes on to provide

> Upon said arbitration, the arbitrator's jurisdiction shall be limited to enforcement and application, without exception, of the provisions of this agreement and, at the request of any party, of the rules and laws of evidence of the state in which said arbitration is held. Should the arbitrator vary or fail to apply and enforce, strictly, any provision of this agreement, or said rules and laws of evidence, for any reason whatsoever, said arbitrator shall be ousted of jurisdiction, and any award made by said arbitrator shall be null and void, and thereafter arbitration shall be recommenced in accordance herewith.

standpoint of the individual shipper who may or may not be covered by comprehensive insurance such as was furnished Mr. Romagnoli by State Farm.[6] As subrogee of Romagnoli, State Farm stands in his shoes, and the validity of the arbitration clause must be evaluated in the terms of its effect on the ability of the private shipper to pursue potentially valid claims under the contract. *See, e.g., Travelers Indemnity Co.* v. *Evans Pipe Co.*, 432 F.2d 211, 212-13 (6th Cir. 1970); *Lumbermens Mutual Casualty Co.* v. *Borden Co.*, 268 F. Supp. 303, 314 (S.D.N.Y. 1967). This contractual term, it may also be noted, was one placed by Aaacon on a form agreement made with a private shipper who, according to his affidavit, was unaware of the existence of the arbitration clause and did not sign the bill of lading himself.

While State Farm raises the claim that the clause limiting venue to New York City is void as an unconscionable term in a contract of adhesion, the principal arguments we need consider relate to the Interstate Commerce Act and are as follows:

1. The restriction on venue constitutes a "limitation of liability" and is therefore unlawful under Section 20(11) of the Interstate Commerce Act, 49 U.S.C. § 20(11).[7]

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6 According to an affidavit in the record, covering January, 1972, through June, 1974. Aaacon instituted 39 proceedings to stay out of state actions in Supreme Court, New York County, of which 10 were apparently against insurance companies, 11 in the Southern District of New York and six in the Eastern District of New York, of which two each were apparently against insurance companies.

7 49 U.S.C. § 20(11) provides in part:

> Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: . . . *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad . . . .

2. The arbitration clause limiting venue to New York City is also void under 49 U.S.C. § 317(a)[8] because the

8 49 U.S.C. § 317(a) provides:

> Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all

ICC, in a decision not appealed from by Aaacon, has refused to approve the clause in Aaacon's tariff.[9]

Section 20(11) of the Interstate Commerce Act, the so-called Carmack Amendment to the Hepburn Act of 1906, states that "any limitation of liability or limitation of the amount of recovery . . . without respect to the manner or form in which it is sought to be made" is "unlawful and void." This provision has been made expressly applicable to common carriers by motor vehicle under the Act in 49 U.S.C. § 319. State Farm argues that Romagnoli's exposure under the form bill of lading to the requirement that he defend his claim in a particular venue, New York City, constitutes a "limitation of liability," and is therefore invalid. The district court rejected this argument, without reference to authority, on the basis that (1) the clause does not limit respondent's recovery of damages since the arbitrator may award the full amount claimed and (2) there is no need for the shipper, Romagnoli, to travel to New York because, as Aaacon made the concession below, he may submit his evidence to the arbitrator in writing.

services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. . . . The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

9 We need not reach appellant's argument that the venue limitation is invalid under 49 U.S.C. § 316(b) which provides:

It shall be the duty of every common carrier of property by motor vehicle . . . to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto . . . .

The statute, however, in its own terms expressly distinguishes the phrase "limitation of liability" from "limitation of the amount of recovery" and goes on to prohibit "any limitation" regardless of "manner or form." The question to be decided is whether Aaacon's exposure to the possibility of having to defend against Romagnoli's claim on the merits in California is a "liability" encompassed by the all-inclusive statutory prohibition against any "limitation of liability." We answer this in the affirmative.[10]

Section 20(11) is a remedial statute, one of the major purposes of which was to provide shippers in interstate commerce with the right to litigate claims against carriers in forums convenient for the shippers. It codified the already existing common law right of the shipper to proceed against a carrier in any forum that had jurisdiction over the carrier and the subject matter. It also gave the shipper the new right to proceed against the initial carrier in a case where damage or loss occurred while the shipment was in the hands of a subsequent carrier. Congressman Richardson commented for the committee on the amendment when it was reported out as follows:

> One of the great complaints of the railroads has been—and, I think, a reasonable, just and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and

10 The cases which have upheld the Aaacon provision have done so without reference to Section 20(11), evidently on the assumption that these bills of lading are like other commercial contracts. *See* discussion in text *infra*.

> receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit.

40 Cong. Rec. 9580 (1906). Congressman Richardson's statement was quoted and relied upon by the Supreme Court in *Atlantic Coast Line Railroad Co.* v. *Riverside Mills*, 219 U.S. 186, 200-01 (1911), which rejected a constitutional challenge claiming that the statute effected a denial of the liberty of contract under the Fifth Amendment. The Court said that a carrier did not have the right to contract to limit its liability to its own lines.

It was not long, however, before the Supreme Court held that the Carmack Amendment preempted state statutes prohibiting carriers from contracting to limit their liability in other ways. In *Missouri, Kansas & Texas Railway Co.* v. *Harriman*, 227 U.S. 657 (1913), the Court upheld a contractual stipulation that the carrier was not liable unless the claim was made within 90 days after loss.[11] As the Court there said,

> The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence.

Id. at 672.

Reacting, Congress sought to close the "special contract" loophole by enacting the first Cummins Amendment in

11 The Court also upheld a reasonable differentiation for rates dependent upon declared value. Under the second proviso to Section 20(11) in certain specific instances, not relevant here, where a value has been declared limitation of liability is permissible.

1915. The 1915 amendment, *inter alia*, inserted a provision declaring any limitation of liability to be unlawful and void (except as to goods on which a declared value has been stated in writing and as to which the commission may establish rates dependent upon declared value). The amendment also added provisos relating to the time for giving of notice and filing of claims and institution of suit and dispensed with the necessity for notice in the case of damage in transit due to negligence. During consideration of the bill, Senator Sutherland specifically stated, after reference to the *Missouri, Kansas & Texas Railway* case, *supra*, that

> the effect of the bill which is now proposed . . . is to continue the provision of law respecting the common-law liability of the carrier, but to remove the condition which now exists in the statute under which the common carrier is permitted to exempt itself from liability by special agreement.

51 Cong. Rec. 9778 (1914).

A further amendment of the Carmack Amendment, the Newton Amendment of 1927, extended the shippers' rights still further by giving the shipper a right of action against the delivering carrier similar to the right of action previously afforded against the initial carrier. Congressman Newton, who reported out the bill, said

> Mr. Chairman, there can be no question on the part of anyone but what there is conferred by the provisions of this bill a very valuable additional right in permitting the consignee to sue and hold the delivering carrier for any loss or damage caused in the course of the shipment from point of origin to point of destination. It will be of real worth and value to shippers not only because suit may be brought by the consignee

> in a jurisdiction which in almost every instance will be in his own county and State, but the granting of the right itself will avoid the necessity of commencing suit in many instances, for it will induce the carrier to make settlement.

67 Cong. Rec. 12764 (1926).

In our view, in light of the legislative history of the Carmack Amendment to the Hepburn Act of 1906, as amended, the right of the shipper to sue the carrier in a convenient forum of the shipper's choice is a right that Congress intended to codify. The language in § 20(11) since its initial enactment, that "nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," is intended to preserve to the shipper his *full* common law right of action against a carrier in any forum in which an action can properly be brought. So, too, the prohibitions added in the Cummins and Newton Amendments against contracts, regulations and other devices by which carriers seek to limit their "liability" must be construed to apply not merely to their liability for monetary damages but to the carrier's liability to suit in the forum of the shipper's choice. It is sufficient to point out that Aaacon could not conceivably contract with its customers to provide that suits could not be brought against it except in a New York City court. Why, therefore, should it be permitted to arrive at the same result by providing that no suit at all should be brought but that a claim must be "settled by arbitration" in New York City?

The foregoing construction of Section 20(11) is consistent with analogous Supreme Court and Second Circuit cases. It also conforms to the Interstate Commerce Commission's own view of the meaning and history of the Carmack Amendment.

In *Boyd* v. *Grand Trunk Western Railroad Co.*, 338 U.S. 263, 265 (1949), the Court held that the right of a shipper to bring suit in any eligible forum is included within the Federal Employers Liability Act provision voiding any contract, rule, regulation or device the purpose or intent of which is to enable a common carrier to exempt itself from liability. So, too, in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1973), the Court indicated in dicta that the principle set forth in *Boyd* is not restricted to FELA cases but has general application. The Court, citing *Boyd*, stated that a "contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought. . . ." *Id.* In *Krenger* v. *Pennsylvania Railroad Co.*, 174 F.2d 556, 559 (2d Cir.), *cert. denied*, 338 U.S. 866 (1949), before *Boyd*, *supra*, a contract limiting venue in an FELA case to the place of residence or the place of accident rather than the place of the defendant carrier's doing business was held void as a limitation of liability prohibited by statute. In *Indussa Corp.* v. *S. S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (en banc), we struck down a forum selection clause in a bill of lading as inconsistent with the provision in Section 3(8) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8), prohibiting any clause, covenant or agreement in a contract of carriage lessening the carrier's liability for negligence, fault or dereliction of statutory duties otherwise than as provided in the Act. While the court expressly stated that the ruling did not "touch the question" of arbitration clauses in bills of lading, 377 F.2d at 204 n.4, its reference in the next sentence to charter parties indicates that its concern was primarily focused upon those commercial situations in which the economic strength and bargaining power of the parties is roughly equal. As noted earlier, that is not the case in most shipping contracts

executed between Aaacon and its customers. In any event, the fact is that Section 2 of the Federal Arbitration Act, adopted in 1925, validated a written arbitration in any maritime transaction which was specifically defined in Section 1 to include bills of lading of water carriers. Whereas the Arbitration Act specifically provides that the validity of arbitration clauses must be judged by the same, not different, standards as those applicable to any other contract provisions, 9 U.S.C. § 2, the sweeping prohibition in the Carmack Amendment against limitations of liability indicates that the scope of arbitration requirements in common carrier bills of lading is not to be left wholly to contractual arrangement. *Indussa* does stand for the proposition, analogous here, that from a practical standpoint to require an American plaintiff to assert his claim only in a distant court "lessens the liability of the carrier quite substantially, particularly when the claim is small." 377 F.2d at 203. *See also* G. Gilmore & C. Black, The Law of Admiralty § 3-25, at 145-46 n.23 (2d ed. 1975).

Our conclusion that the arbitration provision in Aaacon's bill of lading is an impermissible limitation on the carrier's liability has also been reached by the ICC itself through the decision of the chief of the ICC Tariff Section. He has rejected, as a limitation of liability under Section 20(11), a tariff filed by Aaacon containing an arbitration clause with the venue limitation, stating "It was plainly the intent of Congress to allow injured parties to pursue their claims against carriers, without hindrance, in any jurisdiction in which such carriers were doing business or through which they were conducting transportation activities." [12] Under 49 U.S.C. § 317(a) the Commission is authorized to reject any tariff filed with it which is not in consonance with that

12 Letter from James A. McCarthy, Chief of the ICC Tariff Section, to Aaacon, June 15, 1971.

section's requirements[13] and Commission regulations. Any tariff rejected under that section by the Commission is void and its use is unlawful. Note 8 *supra*. The ICC, through the chief of its Section of Tariffs, by letter of June 15, 1971, clearly rejected Aaacon's arbitration provision, stating specifically that to provide service only upon imposing such an unjust and unreasonable condition as compulsory arbitration in New York City is contrary to the common carrier's obligations set forth in Section 216(b) of the Interstate Commerce Act, 49 U.S.C. § 316(b), and the terms of the carrier's certificate.

Aaacon contends that this rejection was ineffective for a number of reasons. While conceding that it took no further steps with regard to the letter of June 15, 1971, which it would be required to do to avoid administrative finality under 49 U.S.C. § 17(6), (9),[14] Aaacon argues that it did not do so because at the time its tariff filing was gratuitous, that is, the Commission had not asserted any jurisdiction over carrier loss and damage claim procedures. Aaacon claims also that three events have occurred which show that the ruling made by the chief of the Tariff Section was

13 Section 317(c) of 49 U.S.C. requires approval of changes in tariffs, such as that proposed in Aaacon's submission that was rejected by Chief McCarthy on June 15, 1971. *See* text at note 12 *supra*. Section 317(d) of 49 U.S.C. requires compliance in tariffs with other provisions of the Act, including § 316(b), note 9 *supra*, and by implication § 20(11), note 7 *supra*.

14 The ICC has authorized the Chief of its Section of Tariffs to review proposed tariffs filed with the Commission to assure that they "comply with the law and the applicable rules and regulations, rejecting those which fail of such compliance." ICC Internal Minute No. 74. It is true that the decisions of the Tariff Section Chief are not decisions made by "the Commission, a division, an individual Commissioner, or a board [of employees designated to hear the matter]," so as to qualify for Commission review under 49 U.S.C. § 17(6). However, such decisions are made under the authority of the Commission, and appeal within the Commission has been provided in 49 C.F.R. §§ 1100.101-.102.

incorrect: first, the Commission "approved arbitration" of shipper-carrier claims in *Ex parte No. 263, Loss and Damage Claims*, 340 ICC 515, 578 *et seq.* (1972); second, several cases have held that 49 U.S.C. § 20(11) "limited venue of shipper litigation"; and finally the Second and Third Circuit Courts of Appeals decided cases upholding and enforcing Aaacon's arbitration provision against attacks based upon 49 U.S.C. § 20(11).

The fact that the Commission was reviewing the question of the handling of claims in *Ex parte No. 263* at the time the section chief's ruling was made is not a proper reason for ignoring his ruling. The possibility that at some future time a regulatory agency may take a different position is not an acceptable reason for violating a present order. Parenthetically we may say that there is no basis whatsoever for the lower court's implication that the rejection letter was not a final act of the Commission, since ICC Internal Minute No. 74 expressly charges the Section of Tariffs to act on behalf of the Commission in examining and rejecting tariffs containing unlawful provisions. This internal directive makes clear that any tariff rejection is to be in the name of the chief of the Section of Tariffs or other designated officers, note 14 *supra*. There being no further steps necessary to be taken by the Commission in evaluating the tariff in question, the Tariff Section's rejection of the Aaacon venue limitation is thus a final act of the Commission. *See generally National Automatic Laundry & Cleaning Council* v. *Schultz*, 443 F.2d 689, 698-702 (D.C. Cir. 1971).

Aaacon's reading of *Ex parte No. 263* as inconsistent with the interpretation of Section 20(11) in this opinion is plainly unmeritorious. The Commission's decision in *Ex parte No. 263* dealt generally with the use of arbitration as a means of settling shipper claims; nothing in

Ex parte No. 263 purports to approve the type of forum-limitation clause challenged in this appeal. The purpose of the proceeding in *Ex parte No. 263* was to determine what action the ICC should take with respect to carriers' practices in handling loss and damage claims. All carriers subject to the Act were made parties to it. The Commission considered three different kinds of proposals for the handling of shipper claims: one, for the settlement of disputed claims by arbitration; two, a proposal for the establishment of small claims courts; and three, a proposal to give the Commission itself power to hear and determine the disputes. 340 ICC at 577-97. Contrary to Aaacon's claims and the district court's interpretation, the decision reached was that legislation requiring arbitration should *not* be proposed. The Commission determined instead to hear and resolve such disputes itself. *Id.* at 718-21, 725. As the Commission said in reference to the remedy of arbitration, "its *quite limited application* to freight loss and damage claims in the past, particularly the recent past in view of the controversies that have been brought to light in this proceeding, legitimately generates substantial questions as to the adaptability of arbitration to this type of situation." *Id.* at 578 (emphasis added). To be sure, the Commission did go on to say:

> In light of all of the above advantages and disadvantages, and in view of the fact that probably as many as 80 to 90 per cent of the loss and damage claims are or can be processed to a satisfactory conclusion by carriers on documentary evidence alone, the utilization of arbitration beyond that limited amount which now exists in the surface transportation industry (other than in labor disputes), while highly commendable and thoroughly encouraged by this Commission, simply does not and perhaps cannot fully meet directly

two major questions that continue to trouble us in this aspect of this proceeding.

Id. at 580-81. But it refused to suggest arbitration as a solution to freight loss and damage claims. The regulations which the Commission did adopt to govern the methods by which carriers should handle claims are shown at 49 C.F.R. § 1005, and they do not include arbitration, and certainly not forum-limited arbitration, as an alternative.

The second intervening event which Aaacon argues makes the ICC tariff rejection based on an improper reading of Section 20(11) is that "[s]everal cases held that 49 U.S. Code 20(11) limited venue of shipper litigation." Appellee's Brief at 46, *citing Litvak Meat Co.* v. *Baker*, 446 F.2d 329, 337 (10th Cir. 1971), and *W. D. Lawson & Co.* v. *Penn Central Co.*, 456 F.2d 419, 423 (6th Cir. 1972). Upon examination, however, *Litvak Meat Co.* v. *Baker* and *W. D. Lawson & Co.* v. *Penn Central Co.* deal only with the fourth proviso of the Carmack Amendment, which limits jurisdiction over delivering carriers to the state "through or into which the defendant carrier operates a line of railroad." 49 U.S.C. § 20(11). Indeed, *Litvak Meat Co.* points out that the Carmack Amendment does not limit personal jurisdiction where the action is brought on a claim at common law or for the carrier's negligence, rather than on the bill of lading. 446 F.2d at 337. *See also Aaacon Auto Transport, Inc.* v. *Eichler*, 392 F. Supp. 926, 927-28 (E.D.N.Y. 1975) (subject matter jurisdiction under Carmack Amendment limited to actions which "arise out of" the bill of lading). The limitation provisions as to the jurisdiction of the person of the carrier in Section 20(11) by no means support the contractual venue limitation which Aaacon seeks to sustain here.

It is true that in *Aaacon* v. *Levine*, 456 F.2d 1335 (2d Cir. 1972), and *Aaacon* v. *Jacobson*, 475 F.2d 1394 (3d

Cir. 1973), this court and the Third Circuit respectively affirmed from the bench two district court cases granting Aaacon's motion to compel arbitration. We do not know what the practice is in the Third Circuit, but in our circuit, of course, affirmances from the bench have no weight and should not be cited. *United States* v. *Joly*, 493 F.2d 672, 675-76 (2d Cir. 1974). This is for good reason, as *Aaacon* v. *Levine* demonstrates. In that case the claim made by the shipper was that the Carmack Amendment entirely prohibited the use of arbitration clauses in carriers' bills of lading. This argument was not directed to the forum limitation clause imposed on the place of arbitration, which is understandable since the shipper in that case, Mr. Levine, was a resident of New York who had done business wtih Aaacon in New York and sued Aaacon in the New York City Civil Court. He was a practicing New York attorney appearing pro se, and evidently did not cite any authority to the district court in support of the argument that the arbitration clause was unfair as applied to him. *See* 71 Civ. 4004.

The final argument raised by Aaacon against application of Section 20(11) is that on September 7, 1972, approximately three months after the contract between Romagnoli and Aaacon was signed, the Commission approved a provision, Aaacon's Claims Tariff "Rule 20," or rather, Item 20 in MF ICC #9, authorizing arbitration at a given location on lost or damaged shipment claims. The tariff states in part, "Carrier's bill of lading shall provide for arbitration and situs thereof pursuant to federal law of unresolved disputes over loss and damage claims in advance of shipments." Evidently this was reviewed by Charles E. Thompson, chief of the Tariff Examining Branch of the Commission, although not by Mr. McCarthy, chief of the Section of Tariffs, who had rejected the earlier tariff by letter of June 15, 1971. There

is nothing to indicate that Mr. Thompson interpreted this clause in Item 20 to mean that Aaacon could directly flout the June 15, 1971, letter of Mr. McCarthy. The phrasing of Item 20 was quite innocuous, and because of the phrase "pursuant to federal law" in a way almost misleading. Upon inquiry by State Farm counsel on July 8, 1974, the Commission denied through Mr. Thompson that the letter of September 7, 1972, in any way rescinded the previous rejection of the provisions of the filing of claims in the tariffs by Mr. McCarthy. In reviewing Item 20, Mr. Thompson stated in a letter to Aaacon's counsel on July 11, 1974, that the provision relative to arbitration "directly conflicts with" the rules established in *Ex parte No. 263, see* 49 C.F.R. § 1005, setting forth the procedures for carriers to follow in the disposition of claims. It is plain enough, in our view, that the provision limiting venue to New York City has been held invalid by the Commission and is not now subject to collateral attack in this court. In any event, any action taken by the Commission subsequent to the date on which Romagnoli and Aaacon entered into the contract in question could provide no relief to appellee in this litigation. We hold that, as of June, 1972, when Romagnoli signed the agreement with Aaacon purportedly incorporating the bill of lading on the reverse side, the tariff upon which that bill of lading was based had been rejected by the ICC and was therefore void under 49 U.S.C. § 317(a).

An additional indication that the ICC's position on this matter has not shifted is that in Decision No. MC-C-7287, *Aaacon Auto Transport, Inc.*, November 30, 1973, ICC Administrative Law Judge Joseph A. Reilly considered at length Aaacon's manner of exploiting its bill of lading, essentially the same as the one it was using in Mr. Romagnoli's case, and concluded that "the forced arbitration of

claims in New York City . . . is palpably unfair to the users of the service of the respondent and imposes on such users an onerous burden they should not be made to bear." He went on to say that the question of forced arbitration in New York City

> becomes particularly acute in light of the fact that the vast majority of claims here involved are under $1,000 . . . [and that it] is obvious that for a claimant residing several hundred or several thousand miles distant from New York City that the costs of travel and incidents thereto would exceed the amount of the claim. Under such circumstances, the claimant has no recourse but to abandon his claim despite the justice of it.[15]

Subsequent to the date of the argument of the present appeal, Division One of the Commission has found that Aaacon engaged in unjust and unreasonable practices in violation of Sections 20(11), 219 and 216(b) of the Interstate Commerce Act, and has entered a cease and desist order to become effective June 1, 1976. *Aaacon Auto Trans-*

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15 Other practices found unreasonable, findings which were upheld in *Aaacon Auto Transport, Inc.—Investigation and Revocation of Certificate*, 124 MCC 493, 504-05 (Div. 1, Apr. 7, 1976), were denying claims on the basis of an "inherent mechanical defect," or for an "act of God" without real investigation, or because of the execution of a "clear receipt," *i.e.*, paying the driver and receipting for the car. The Commission order in MC-C-7287 was issued on April 7, 1976. It states in part:

> *It is further ordered*, That in No. MC-C-7287, respondent AAACon Auto Transport, Inc., be, and it is hereby, ordered and required to cease and desist, and thereafter refrain and abstain from all of those practices found in the said report to be unjust and unreasonable in violation of sections 20(11), 219, and 216(b) of the Interstate Commerce Act, as well as those operations, in interstate or foreign commerce, of the character found in said report to be unlawful.

port, Inc.—Investigation and Revocation of Certificates, 124 MCC 493 (Div. 1, Apr. 7, 1976), note 15 *supra.*[16]

The Division's findings were that Aaacon has "conducted itself in such a way as to discourage the filing of damage claims and has otherwise sought to avoid its responsibilities as a motor common carrier. . . ." *Id.* at 503-04. The Division did not decide whether the incorporation of an arbitration clause into Aaacon's bill of lading is acceptable or even desirable. *Id.* at 506. But it did find that "in this instance, [the arbitration clause was] used in a manner to discourage and confuse prospective and actual claimants." *Id.* Evidently Aaacon argued to the Division that its agreement would not legally require that arbitration be held in New York City; but the Division pointed out that the wording of it "would lead the average individual to the conclusion that arbitration must be held in New York City, and a prospective claimant, when faced with the expense and inconvenience of bringing an action in New York City, might well forego seeking relief." *Id.* Aaacon by post-appeal correspondence contends that this conclusion is irrelevant since here it is the carrier that seeks to enforce the arbitration provision. We think the language of the Commission speaks for itself on the question whether the arbitration provision complies with Section 20(11). It adds further support to our statutory conclusion that the venue limitation constitutes a limitation of liability and, as such, is invalid.

Aaacon argues that *Aaacon Auto Transport, Inc.* v. *Ninfo,* 490 F.2d 83 (2d Cir. 1974), plus assorted district court cases, *e.g.,* (E.D.N.Y. Feb. 17, 1976); *Aaacon Auto Transport, Inc.* v. *Teafatiller,* 334 F. Supp. 1042, 1044

16 The Division noted that Aaacon's exceptions to the administrative law judge's 32-page report themselves covered 756 pages, 124 MCC at 503.

(S.D.N.Y. 1971), are authority for its position that the arbitration limitation clause is valid. *Ninfo* was an appeal by Aaacon from an order granting a shipper's motion to change venue, in a proceeding to compel arbitration, to the federal district court for the Eastern District of Wisconsin where she had brought suit in the state court. The court dismissed the appeal, suggesting, however, that the district court should proceed to try the issue of the validity of the agreement of arbitration in terms of whether or not the agreement was ever entered into. No mention is made in the case whatsoever of the arguments advanced here under the Interstate Commerce Act. Similarly, *Aaacon Auto Transport, Inc.* v. *Teafatiller, supra,* upheld the agreement to arbitrate as not required to be signed by the party to be charged, as to jurisdictional amount even though less than $10,000 was involved, and as to the validity of service of process by mail in California, and refused to transfer venue to California. No mention is made in Judge Brieant's opinion of any of the arguments under the Interstate Commerce Act. Similarly, as we have reviewed other district court cases in which appellee has been permitted to obtain arbitration in New York, we see that, with but one exception, none of them have presented the very effective arguments made by State Farm here. The exception was *Echols,* in the Eastern District of New York, which followed the decision of Judge Costantino from which this appeal was taken. District Judge Chandler in *Aluminum Products Distributors, Inc.* v. *Aaacon Auto Transport, Inc.,* 404 F. Supp. 1374 (W.D. Okla. 1975), has on the other hand held the Aaacon arbitration clause invalid and unenforceable, not approved by the Interstate Commerce Commission, grossly unfair and an improper attempt to limit Aaacon liability. While an appeal is still pending in the Tenth Circuit on the *Aluminum Products* decision, we believe it indicates that the prior district

court cases in which the arguments relating to the Interstate Commerce Act are not pressed lend very little support for Aaacon's position at the present appeal.

We have already concluded that the arbitration limitation clause does effect a limitation on the carrier's liability in that it severely prejudices the claimant's possibility for recovery of damages. Judge Costantino, however, felt this prejudice to be insubstantial since, in his view, there was no need for the shipper, Romagnoli, to travel to New York. This was based upon Aaacon's concession that Romagnoli could send a simple notarized letter to the arbitrator setting forth the facts of which he had personal knowledge, and that if Aaacon had any questions to pose to Romagnoli it would simply pose them by letter. We are totally unimpressed with this "concession." Our question of law is as to the validity of the provision limiting arbitration venue as a "limitation of liability." The concession in no way mitigates the burden, expense and prejudice to shippers created by Aaacon's bill of lading. Even in the Romagnoli case, the testimony of the adjuster who inspected the damaged vehicle may not effectively be presented by letter, and Aaacon's concession does not extend to this testimony in any event. Aaacon has not waived the provision in its bill of lading requiring adherence to the Rules of Evidence, note 5 *supra*, so that it would be free to argue that the written testimony, especially if not subject to cross-examination in front of the arbitrator, should be given little weight by him. The condition of the vehicle before and after the accident, the qualifications of the shipper's expert and the accuracy of the expert's testimony on damages all are not covered by the concession so heavily relied upon by Judge Costantino. The judge evidently was misled by the language in *Ex parte No. 263* that probably as much as 80 to 90 percent of the loss and damage claims can be processed to a satisfactory conclusion by carriers on docu-

mentary evidence alone, 340 ICC at 580, 595. But the Commission was not talking about the handling of an arbitration case; rather it was discussing the processing of claims by the carriers themselves. *Id.* at 595.

Additionally, the judge stated that Mr. Romagnoli's interests could be adequately represented at the New York arbitration by State Farm's local counsel. That certainly would not be true if there were not a national insurer involved in the case. But even assuming the relevancy of State Farm's presence as the insurer, it is the expense and prejudice inherent in trying to establish a prima facie case with witnesses who are a continent away from New York counsel that makes the bill of lading operate in effect as a limitation of liability. Judge Costantino pointed to the facts that the contract was arranged in Georgia, the car was tendered in South Carolina, the alleged incident took place in Washington, the driver resides in Wyoming, Aaacon's records are in New York and the owner resides in California as indicating that no one state is the obviously best place to hold a hearing to arbitrate the claim. This conclusion, however, does not follow from the facts. The expert witnesses would have to be familiar with the costs of repair and the value of used motor vehicles in California; Mr. Romagnoli resides in California: Aaacon has offices in California; and there is no indication that its records in New York would have any bearing on the claim.

Finally, the lower court suggested that it would be harmful and perhaps unjust to Aaacon to establish a rule requiring it to litigate, or arbitrate, claims at various places in the country at great expense. However, there is nothing in the record to indicate that it would cost Aaacon any more to defend a claim in California, or in any other forum convenient to its customer, than in New York. The poten-

tial witnesses are not in New York. Indeed, the burden is on the claimant to proceed and to produce witnesses.

In light of the position that we have taken in respect to the Interstate Commerce Act, it is unnecessary for us to reach the contract-of-adhesion/unconscionability arguments. Indeed it is not necessary for us to consider at this time whether the basic requirement that a claimant arbitrate his claim is inconsistent with Section 20(11). *Cf. Wilko* v. *Swan*, 346 U.S. 427 (1953) (agreement for arbitration of claims between broker and his customer void under § 14 of Securities Act of 1933).[17] This is obviously a matter for determination in the first instance by the ICC in a proceeding similar to that it held in *Ex parte No. 263*. Aaacon argues that even if the words "in New York" were not contained in the arbitration clause the result in the court below would be the same since both State Farm and Aaacon are amenable to process in New York, and the petition for enforcement of the arbitration agreement was filed in New York federal court. We decline to accept this twelfth-hour invitation of Aaacon's to amend its pleadings *and* its bill of lading. As it stands, the arbitration clause containing the limitation of venue to New York is invalid as a limitation of liability under 49 U.S.C. § 20(11). Moreover as shown above, the tariff upon which Aaacon relies to sustain the arbitration clause had been rejected by the ICC and thus, under 49 U.S.C. § 317(a), was void at the time that Romagnoli entered into this contract with Aaacon.

Judgment reversed.

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17 All we need say here is that the prohibition in Section 20(11) invalidating the venue limitation for arbitration is not overridden by the Arbitration Act, a conclusion further supported by the language of *Wilko* v. *Swan*, 346 U.S. 427, 437 (1953), which relies on *Boyd* v. *Grand Trunk Western R. Co.*, 338 U.S. 263 (1949).

APPENDIX 3 – ORDER OF SECOND CIRCUIT DENYING REHEARING

ORDER DATED AUGUST 6, 1976

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-six

Present:

HON. J. EDWARD LUMBARD,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

AAACON AUTO TRANSPORT, INC.,

Plaintiff-Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, SUBROGEE OF JOSEPH ROMAGNOII,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellee

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro, Clerk
by: Edward Guordano
Senior Deputy Clerk

BEST COPY AVAILABLE

APPENDIX 4 – SECOND CIRCUIT ERRATA SHEET

ERRATA ON OPINIONS 1975 TERM

Page 4088, line 20—delete "479" and insert "476" in place thereof.

Page 4088, footnote 11, 5 lines up from bottom of page—delete "as" and insert "a" in place thereof.

Page 4089, footnote 12, 3 lines up from bottom—delete "opinon" and insert "opinion" in place thereof.

Page 4095, footnote 16, 7 lines up from bottom of page—before "We" insert "quotation marks".

Page 4096, footnote 18, 6 lines up from bottom of page—delete *"Bankers Life & Co.,"* and insert *"Bankers Life & Cas. Co.,"* in place thereof.

Page 4097, line 25—change "§301(1)" (i.e., number one) to "§301(l)" (i.e., letter el).

Page 4098, line 20—delete "More" and insert "Most" in place thereof.

Page 4107, line 12—delete "defend" and insert "prosecute" in place thereof.

Page 4112, line 2—delete "a shipper" and insert "an employee" in place thereof.

Page 4118, lines 1 and 2—delete entirely and insert "Cir. 1973), this court affirmed from the bench and in reliance on that affirmance the Third Circuit affirmed by order two district court cases granting" in place thereof.

Page 4121, line 30—after "court cases, *e.g.*," insert *"Anacon Auto Transport, Inc.* v. *Echols*, No. 75 Civ. 1268,".

Page 4279, line 2—after "envelope of money." insert "In addition, Hall testified to one occasion on which she visited Monell in jail while Mrs. Grant and Doulin were meeting outside; on being introduced to Hall afterwards, Doulin remarked that she must be "the girlfriend of the bad boy." ".

Page 4279, line 7—after "bation." insert "Shapiro also recounted a statement by Doulin that he had "put in a good word, or done a favor . . . for a grandson of an old dear friend." ".

Page 4283, line 23—after *"Id."* insert "Such statements are admissible if the trial judge finds independent evidence that the defendant participated in a conspiracy with the declarant. *United States* v. *Geaney*, 417 F. 2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Doulin's admission to Shapiro that he had put in a good word for Monell as a favor to Mrs. Grant, his meeting with Mrs. Grant and comment to Hall that she must be the girlfriend of the "bad boy," his close friendship with Mrs. Grant, and Mrs. Grant's trip to his funeral parlor with $1,400 in cash provided a reasonable basis for Judge Ward to make a finding of conspiracy. See id. at 1120-21. It is of no import that a conspiracy was not charged in the indictment. *United States* v. *Ruggiero*, *supra* at 607.".

Page 4309, line 12—delete the "comma" after "employee".

APPENDIX 5 – ORDER OF THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1197

IN THE MATTER OF THE ARBITRATION OF
CERTAIN DIFFERENCES BETWEEN
AAACON AUTO TRANSPORT, INC.

v.

BEATRICE JACOBSON

Appellant.

(Dist. of New Jersey Civil Action No. 1733-71)

Submitted Under Third Circuit Rule 12(6)
March 2, 1973

Before: MARIS and ALDISERT, *Circuit Judges.*
and GORBEY, *District Judge.*

JUDGMENT ORDER

After consideration of all of the contentions presented by appellant, and being in accord with *AAACON Auto Transport, Inc. v. Levine,* ——F.2d—— (2d Cir. 1972, Docket No. 71-2100); it is

ORDERED AND ADJUDGED that the judgment of the district court is affirmed.

Costs taxed against appellant.

BY THE COURT
s/Aldisert
Circuit Judge

Attest:
s/
Thomas F. Quinn, Clerk

RECEIVED & FILED MARCH 2, 1973
THOMAS F. QUINN, Clerk

DATED: March 2, 1973